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Supreme Court of the United States

OCTOBER TERM, 1950

No. 302

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, ET AL., ETC., APPELLANTS,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, ET AL., ETC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

FILED SEPTEMBER 11, 1950.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, Emil Heimsch, Thomas Lansing, John F. Sheehan, E. F. Regner, Edward P. Regan, La Moine S. Cardinal, Individually, and as officers of Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and Local 18, United Gas, Coke and Chemical Workers of America, (C.I.O.), Plaintiffs,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. Fitzgibbon and Henry C. Rule, individually and as Commissioners constituting the Wisconsin Employment Relations Board, and Thomas E. Fairchild, individually and as Attorney General of the State of Wisconsin, and the Milwaukee Gas Light Company, a Wisconsin Corporation, Defendants

AMENDED COMPLAINT—Filed October 18, 1949

For their amended complaint, plaintiffs allege that:

1. This is a suit of a Civil nature seeking an injunction and a declaratory judgment, and arises under the Constitution of and the laws of the United States.

2. The jurisdiction of the court is based upon:

(a) The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00) pursuant to Section 1331 of Title 28 of the U. S. C. A.

(b) The suit arises under the United States laws regulating commerce, pursuant to Section 24 (1) (8) Title 28 U. S. C.

(c) Plaintiffs seek to redress the deprivation under color of a state law their right, privilege and immunity secured

by the Constitution of the United States and an act of Con-
[fol. 4] gress, providing for equal rights of citizens or of all persons within the jurisdiction of the United States, pursuant to Section 1343 of Title 28 of the United States Code.

3. The plaintiff, Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and hereinafter referred to as the Union, is an unincorporated association of employees employed in the production, maintenance, operation, construction and meter reading, of approximately seven hundred seventy (770) in number, all of whom are employed with the defendant, Milwaukee Gas Light Company, and that the office of the said Union is in the city of Milwaukee, Milwaukee County, Wisconsin; that it is a labor organization as defined in Section 2 (5) of the Labor Management Relations Act of 1947.

4. The plaintiff, Chester Walzcak, is a citizen of the United States and a resident of the city and county of Milwaukee, Wisconsin, residing at 3350 North Richards Street, and is the International Representative of said Union.

5. The plaintiff, Arthur St. John, is a citizen of the United States, and a resident of Waukesha County, Wisconsin, residing at Route 12, Box 529, and is the President of the said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Five Hundred Dollars ($3500.00).

6. The plaintiff, Al Fuhrman, is a citizen of the United States, and a resident of Milwaukee County, Wisconsin, residing at 6308 Beloit Road, West Allis 14, and is the Vice President of the said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Three Hundred Dollars ($3300.00).

7. The plaintiff, Emil Heimsch, is a citizen of the United States, and a resident of Milwaukee, Wisconsin, residing [fol. 5] at 1054 North 46th Street, and is the Chairman of the Bargaining Committee of the Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Seven Hundred Dollars ($3700.00).

8. The plaintiff, Thomas Lansing, is a citizen of the United States, and a resident of Milwaukee, Wisconsin, residing at 2779 South Superior Street, and is a member of the Bargaining Committee of said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Five Hundred Dollars ($3500.00).

9. The plaintiff, John F. Sheehan, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 2518 South 11th Street, Milwaukee, and is a member of the Bargaining Committee of said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Two Hundred Dollars ($3200.00).

10. That the plaintiff, E. F. Regner, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 2371 South 79th Street, West Allis 14, and is a member of the Bargaining Committee of said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Three Hundred Dollars ($3300.00).

11. The plaintiff, Edward P. Reagan, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 2933 North Cramer Street, and is a member of the Bargaining Committee of said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand One Hundred Dollars ($3100.00).

12. The plaintiff, La Moine S. Cardinal, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 1435 West Kilbourn Avenue, and is a mem- [fol. 6] ber of the Bargaining Committee of said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Thirty Two Hundred Dollars ($3200.00).

13. The plaintiff, Gordon Donnelly, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 2134A North 2nd Street, and is the recording secretary of said Union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand One Hundred Dollars ($3100.00).

14. The defendant, L. E. Gooding, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city of Fond du Lac, Winnebago County, Wisconsin. The defendant, J. E. Fitzgibbon, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city of Milwaukee, Milwaukee County, Wisconsin. The defendant, Henry C. Rule, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city of Eau Claire, Eau Claire County, Wisconsin. That all of said defendants constitute the Wisconsin Employment Relations Board, which has offices at 110 East Wisconsin Avenue, Milwaukee, Wisconsin. That said Wisconsin Employment Relations Board is established pursuant to and under the Statutes of the State of Wisconsin, Section 111.03 Wis. Stats. of 1947, and is composed of the aforesaid Commissioners; that said Board has for its duty the enforcement and compliance with Sub-Chapter 3 of Chapter 111 of the Laws of the State of Wisconsin titled "Public Utilities" as set forth in Sections 111.50 through 111.64 Wisconsin Statutes of 1947.

15. The defendant, Thomas E. Fairchild, is the duly [fol. 7] elected, qualified and acting Attorney General of the State of Wisconsin, and as such is charged with the enforcement of the laws of the State of Wisconsin; is a citizen of the United States and is a resident of the city of Madison, Dane County, Wisconsin.

16. That the defendant, Milwaukee Gas Light Company, hereinafter referred to as the defendant company, is a Wisconsin corporation and is a public utility employer with offices located at 606 East Wisconsin Avenue, Milwaukee, Wisconsin, and is primarily engaged in furnishing the following services: Illuminating and heating gas to the general public in the city and county of Milwaukee, Wisconsin. That it is engaged in commerce and trade effecting commerce, as defined in Sections 2 (6) and 2 (7) of the Labor Management Relations Act of 1947.

17. The plaintiffs bring this action on behalf of themselves and all others similarly situated, that is to say, the

members of the Union who are also employees of the defendant company, and are authorized so to do.

18. That the annual earnings of all of such members of the Union as employees of the defendant company is approximately Two Million Three Hundred Ten Thousand Dollars ($2,310,000.00).

19. The members of the Union, including the plaintiffs, have assembled and associated themselves in the said Union for the purpose of collective bargaining and otherwise dealing with the defendant company concerning hours of employment, rates of pay, pensions, working conditions, grievances arising out of employment, and for other mutual aid and protection, and by such means to improve their economic and social conditions as citizens of the United States.

20. The Labor Management Relations Act of 1947, adopted by the Congress, is a law regulating commerce as set forth in Section 101 and Section 204 of the Act as Amended. That since 1937, to August 1st, 1943, the defendant company recognized the plaintiff Union as the [fol. 8] exclusive bargaining representative for all of its employees performing production and maintenance work, for the purpose of bargaining with respect to rates of pay, hours of employment, and other conditions of employment, and that on August 1st, 1943, the plaintiff union was duly certified by the National Labor Relations Board, acting under the National Labor Relations Act of 1935, as the exclusive bargaining representative for all of the employees of the defendant company in said unit, for the purpose of bargaining with respect to rates of pay, hours of employment, and other conditions of employment.

21. That commencing with June, 1937, and annually thereafter including June, 1948, the plaintiff union and the defendant company entered into collective bargaining agreements for wages, hours of employment, and other working conditions of all of the employees represented by the said Union.

22. That the most recent of such contracts was entered into between the plaintiff union and defendant company on September 24th, 1948, which by its terms remained in full force and effect until June 1st, 1949, and from year to year thereafter unless terminated by written notice on or before April 1st, of any year; that the plaintiff union terminated

said agreement as of June 1st, 1949, by written notice to the defendant company prior to April 1st, 1949, as required by Section 8 (d) of the Labor Management Relations Act of 1947.

23. That the Federal Mediation and Conciliation Service, acting under the Notice of Termination of Contract, copy of which was submitted to it, intervened and proceeded to assist in the negotiation of a contract for the year 1949-50.

24. That the probable earnings of all of such employees represented by the plaintiff union for a contemplated contract for the year 1949-50 is Two Million Three Hundred Ten Thousand Dollars ($2,310,000.00).

[fol. 9] 25. That on September 19th, 1949, the plaintiff union filed a petition with the National Labor Relations Board, charging the defendant company with having violated Section 8 (a) (5) of the Labor Management Relations Act of 1947, in that it was guilty of an unfair labor practice for having failed and refused to bargain collectively with the plaintiff union, the duly authorized bargaining representative of the majority of the employees in the bargaining unit, and that such petition is now pending before the National Labor Relations Board.

26. Subsequent to the filing of the aforesaid petition with the National Labor Relations Board, defendant company did enter into collective bargaining with the plaintiff union covering wages, pensions, hours and other conditions of employment.

27. That on October 4th, 1949, the plaintiffs, because of the failure of the defendant company to compromise upon and agree to wages, pensions and other working conditions, left the employment of the defendant company individually, in concert, and in agreement with others, and commenced to peacefully picket the company premises.

28. That the defendant, Wisconsin Employment Relations Board, acting under the purported authority of Section 111.63 Wisconsin Statutes 1947, secured an injunction from the Circuit Court of Milwaukee County, restraining the plaintiffs from leaving their place of employment in concert or in agreement with others, and from picketing or otherwise violating the provisions of subchapter 3, chapter 111 of the Wisconsin Statutes of 1947.

That the Circuit Court of Milwaukee County had no jurisdiction of the subject matter of this suit, in which said restraining order was issued, for the reason that sub-chapter 3, Chapter 111, of the Wisconsin Statutes of 1947, is in direct conflict with the United States Labor-Management Act of 1947, and the declared public policy of the United States.

29. The defendant Attorney General, together with the [fol. 10] defendant Wisconsin Employment Relations Board, has since caused the issuance of process to punish the plaintiffs and other employees of the defendant company for whom this action is brought, for allegedly violating the injunction of the Circuit Court and sub-chapter 3, Chapter 111 of the Wisconsin Statutes of 1947; that unless the relief prayed for herein is granted by this court the plaintiffs and others for whom they are authorized to act, will be subjected to fines or imprisonment, or both.

30. The defendant Attorney General of the State of Wisconsin, acting through the District Attorney of Milwaukee County, unless the relief prayed for herein is granted by this court, threatens to invoke the criminal penalties prescribed by the said Section 111.62 of sub-chapter 3, Chapter 111 of the Wisconsin Statutes of 1947, against the plaintiffs and others for whom said plaintiffs are authorized to act, and that said threatened action by the defendant Attorney General is unlawful for the reason that such action is repugnant to the Constitution and laws of the United States.

31. That on October 6th, 1949, plaintiff union and the defendant company agreed upon wages, hours and other conditions of employment, but have not agreed on the exact terms and conditions of the pension plan for the employees of the defendant company for whom the plaintiff union is authorized to bargain; that the defendant company threatens to invoke Section 111.55 and other provisions of Subchapter 3, Chapter 111 Wisconsin Statutes of 1947, to compel the plaintiffs to agree to a pension plan as may be determined by a board of arbitrators provided for in said Statutes.

32. That the defendants, L. E. Gooding, J. E. Fitzgibbons and Henry C. Rule, as the Wisconsin Employment Relations Board, and the defendant Thomas E. Fairchild as the

Attorney General, threaten to compel the plaintiffs to sub-
[fol. 11] mit the unresolved issue of pensions involved in the negotiations, to arbitration, and to accept and abide by the result of such arbitration under penalty of confinement in the common jail.

33. That on the 28th day of September, 1949, the defendant company filed with the Wisconsin Employment Relations Board, a petition, a copy of which is herewith attached and marked Exhibit "A" and made part of this amended complaint.

34. That on October 3rd, 1949, the defendant, Wisconsin Employment Relations Board, issued an order, a copy of of which is attached hereto and marked Exhibit "B", directing the plaintiffs to choose arbitrators as provided in sub-chapter 3, Chapter 111 of Wisconsin Statutes of 1947, and that such order issued under the purported authority of the Wisconsin Statutes has not been revoked, and remains as threatened by the Wisconsin Employment Relations Board, binding upon the plaintiffs.

35. That the order, and threatened action of both the defendant Wisconsin Employment Relations Board and the Attorney General are all in conflict with the United States Labor-Management Relations Act of 1947, and is repugnant to the Constitution of the United States.

36. That the Wisconsin Employment Relations Board and the defendant company claim to act under authority of sub-chapter 3 of Chapter 111 of the Laws of the State of Wisconsin, 1947, the material parts of which are as follows:

> "111.55. Conciliator unable to effect settlement; appointment of arbitrators. If the conciliator so named is unable to effect a settlement of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute."

[fol. 12] "111.56. Status quo to be maintained. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action by either party without the consent of the other."

"111.62. Strikes, work stoppages, slowdowns, lockouts, unlawful; penalty. It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employes when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons, to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer, or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor."

"111.63. Enforcement. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply."

37. That the aforesaid provisions of the laws of the State of Wisconsin are in direct conflict with the Labor Management Relations Act of 1947, in that such Wisconsin Acts deny plaintiffs the right to bargain collectively, but compels them to accept a contract drawn by strangers to them, and without their consent or approval.

38. That the threatened act of the defendants to compel the plaintiffs to accept a contract drawn by strangers to them deprives them of their fundamental constitutional right to make and enter into their own labor agreement covering wages, hours and other conditions of employment.

39. That under the Labor Management Relations Act of 1947, and under the Constitution of the United States, the plaintiffs, should they fail in negotiating a labor con-[fol. 13] tract with the defendant company, have the right to leave their place of employment, either individually or in concert, but under Section 111.62 it is unlawful for the plaintiffs to leave their place of employment, should they fail to reach an agreement with the defendant company, in concert or in agreement with others under penalty of confinement in the common jail.

40. That it is therefore essential in the judgment of the plaintiffs that they exercise their rights as citizens, including the right to enter into a collective bargaining agreement without restraint, coercion or compulsion on the part of the defendants, and including the right of free speech and assembly and petition, and the right to leave their place of employment individually, in concert or in agreement with others, should they fail to enter into a collective bargaining agreement with the defendant company.

41. That the plaintiffs seek to enjoin and perpetually restrain the defendants:

(a) from interfering with the plaintiffs' right, privilege and immunity secured to them by the Constitution of the United States and the Labor Management Relations Act of 1947; from entering into a contract or agreement with the defendant company on the issue of pensions, or any other negotiable issue voluntarily, and in the absence of that, from leaving their place of employment individually, in concert or in agreement with others;

(b) from taking any steps, issue any process in the Circuit Court of Milwaukee County which seeks to impose a penalty by way of fine or imprisonment or both, upon the plaintiffs or others similarly situated, for allegedly violating the restraining order of the Circuit Court of Milwaukee County issued on October 5th, 1949;

(c) from taking any steps, signing any complaint, issuing [fol. 14] any warrant, or threatening to do any such acts, which have for their purpose the arrest or punishment of the plaintiffs by fine or imprisonment, or to otherwise enforce the penalties of sub-chapter 3, Chapter 111 of the Wisconsin Statutes of 1947.

42. For all of the aforesaid reasons there is a real and justiciable case and an actual controversy between these plaintiffs and the defendants; the defendant Wisconsin Employment Relations Board and its Commissioners, and the defendant Attorney General, in threatening to enforce an unconstitutional and void statute, are acting outside their authority as officers of the State of Wisconsin; plaintiffs have no adequate or timely remedy at law and they will suffer irreparable injury, and that unless the relief herein prayed for is granted they will be in jeopardy and will be forced to defend many criminal prosecutions and other proceedings in court, and will be forced to expend large sums of money in defending such suits and the hazards of fines and imprisonments upon the plaintiffs and other similarly situated; that plaintiffs are and will thereby be deprived of their rights under the constitution and the laws of the United States, to enjoy the rights of free citizens of the United States.

43. This suit for a declaratory judgment and injunction offers plaintiffs the only remedy to secure an adjudication of the validity of sub-chapter 3, Chapter 111 of Wisconsin Statutes of 1947 in time to exercise their rights as citizens of the United States.

44. That the threatened acts of the defendants, and the laws under which they seek to impose such acts, unlawfully restrict and abridge the civil rights of the plaintiffs by denying them the freedom of speech and the right of peaceful assembly and petition; unlawfully limits their freedom to join in a labor organization, and to make effective use of any joint action on their part, and thereby deprives them [fol. 15] of their liberty and their property without due process of law; unlawfully prevents them from entering into contracts of employment by their own act and thereby prohibits them from the right of contract; unlawfully and arbitrarily discriminates against the plaintiffs by reason that they are employees of a public utility and prohibits them from using their joint efforts in arriving at a voluntary labor contract covering their wages, hours, and other conditions of employment, and thereby deprives them of the equal protection of the law as citizens of the United States, and that such classification is arbitrary, grossly discriminatory, invidious, and is repugnant to the Constitution of the United States; unlawfully invades the rights and liber-

ties of the plaintiffs by seeking to compel them to remain at their place of employment, and that such acts are in violation and repugnant to the laws and Constitution of the United States.

Wherefore plaintiffs pray that:

(a) The defendants be directed full, true and perfect answer to make to this complaint.

(b) A three judge court be convened pursuant to the provisions of Title 18, U. S. Code, Section 380.

(c) The defendants and each of them, be restrained and enjoined from taking any action or proceeding, make any threat to take any action or proceeding, to compel the plaintiffs to submit to arbitration, or to enter into a labor contract on any negotiable issue, against their will and judgment, or petition any court of record or file any complaint seeking to compel the plaintiffs to submit to arbitration; or take any steps or file any complaint, or pursue any proceeding which would seek to punish the plaintiffs for allegedly violating any court order issued under the purported authority of sub-chapter 3, Chapter 111 of Wisconsin Statutes, 1947; or to take any steps, file any complaint, issue any warrant or other process, or threaten to [fol. 16] do so, seeking to arrest or otherwise punish by fine or imprisonment, the plaintiffs or others for whom they are authorized to act, for allegedly violating any of the provisions of sub-chapter 3, Chapter 111, Wisconsin Statutes of 1947.

(d) That the court issue a permanent injunction enjoining and restraining the defendants and their agents from taking steps to enforce the penalities of sub-chapter 3, Chapter 111 of Wisconsin Statutes of 1947, or other provisions thereof, which interfere with the rights of the plaintiffs as citizens of the United States, and which are in conflict with the laws of the United States and the Constitution of the United States.

(e) This court issue a judgment declaring that the provisions of sub-chapter 3, Chapter 111 of the Wisconsin Statutes of 1947, insofar as they may be applied to penalize these plaintiffs and others for whom they are authorized to act, to compel them to submit to arbitration on any negotiable issue or which has for its purpose the punishment of the plaintiffs for having left their place of emplo-

ment in concert or in agreement with others, or for having picketed the defendant company's premises, are void, illegal, unenforceable and repugnant to the United States Labor-Management Relations Act of 1947, and to the Constitution of the United States.

(f) The plaintiffs have such other and further relief as to the court may seem just and equitable.

(S.) Max Raskin, Attorney for Plaintiffs, Suite 1801, Wisconsin Tower, 606 W. Wisconsin Avenue, Milwaukee, Wisconsin.

[fol. 17] *Duly sworn to by Chester Walczak. Jurat omitted in printing.*

[fol. 18] EXHIBIT "A" TO AMENDED COMPLAINT

State of Wisconsin

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF THE PETITION OF MILWAUKEE GAS LIGHT COMPANY for appointment of a Conciliator pursuant to Section 111.54 of the Wisconsin Statutes for 1947

The petition of Milwaukee Gas Light Company represents and shows as follows:

1. The petitioner, Milwaukee Gas Light Company, is a Wisconsin corporation and is a public utility employer within the meaning of Subchapter III of Chapter 111 of the Wisconsin Statutes of 1947; and its principal office is located at 606 East Wisconsin Avenue, Milwaukee 2, Wisconsin.

2. The petitioner is primarily engaged in furnishing essential service within the meaning of Section 111.51 of the Wisconsin Statutes for 1947, to-wit, illuminating and heating gas to the general public in the City and County of Milwaukee, Wisconsin.

3. Petitioner employs a total of approximately One Thousand Three Hundred Ten (1,310) employees. Approximately Seven Hundred Seventy (770) employees of the petitioner, engaged in production, maintenance, operation, construction and meter reading, constitute a separate collective bargaining unit, and are represented for collective bargaining purposes by a labor organization, to-wit, Local

18, United Gas, Coke and Chemical Workers of America (CIO), hereinafter referred to as the "Union".

4. Petitioner and said union executed a Labor Agreement of September 24, 1948, which by its terms remained in full force and effect until June 1, 1949, and from year to year [fol. 19] thereafter unless terminated by written notice on or before April first of any year; and the Union terminated said agreement as of June 1, 1949, by written notice to the Company prior to April 1, 1949.

5. Petitioner has attempted in good faith to negotiate the terms of a labor agreement with the Union but has not been able to reach an agreement with the Union, although John E. Roe, Madison, Wisconsin, was appointed as Conciliator by order of the Wisconsin Employment Relations Board, dated September 14, 1949, and participated in several meetings between petitioner and the Union; and petitioner believes said collective bargaining negotiations have reached an impasse and stalemate and that said parties will be unable to effect settlement of said dispute without the intervention, aid and assistance of the conciliation and/or arbitration processes and procedures provided for in Sections 111.50 through 111.65 of the Wisconsin Statutes for 1947.

6. Petitioner is informed and believes that said dispute if not settled will cause or is likely to cause an interruption of said essential service, to-wit; the furnishing of illuminating and heating gas to residents of the City and County of Milwaukee, Wisconsin.

Wherefore, your petitioner requests that pursuant to Section 111.54 of the Wisconsin Statutes for 1947, the Wisconsin Employment Relations Board reappoint said John E. Roe, or appoint such other person as it may select, as conciliator to meet with said parties for the purposes set forth in Sections 111.54 and 111.55 of the Wisconsin Statutes for 1947.

Dated at Milwaukee, Wisconsin, this 28th day of September, 1949.

Milwaukee Gas Light Company, by Glenn R. Chamberlain, President.

[fol. 20] *Duly sworn to by Glenn R. Chamberlain. Jurat omitted in printing.*

[fol. 21] EXHIBIT "B" TO AMENDED COMPLAINT

State of Wisconsin

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS BOARD

In the Matter of the Dispute Between the
MILWAUKEE GAS LIGHT COMPANY

and

UNITED GAS, COKE & CHEMICAL WORKERS OF AMERICA, LOCAL 18, affiliated with the Congress of Industrial Organizations

ORDER APPOINTING ARBITRATORS

The Wisconsin Employment Relations Board having heretofore and on the 14th day of September, 1949, upon its own motion appointed John E. Roe of Madison, Wisconsin, as conciliator pursuant to Section 111.54 of the Wisconsin Statutes for the purpose of attempting to settle a dispute existing between the employes of the Milwaukee Gas Light Company represented by the United Gas, Coke & Chemical Workers of America, Local No. 18, affiliated with the Congress of Industrial Organizations, and that the Company and the said John E. Roe having on the 3rd day of October, 1949, reported to the Board that the dispute between the parties continues to exist, and from such report it appearing that a continuation of the dispute will cause or is likely to cause the interruption of the essential service:

Now, Therefore, it is

Ordered

That pursuant to Section 111.55 of the Wisconsin Statutes the following named persons, all of whom have qualified as arbitrators under the provisions of Section 111.53 of the Wisconsin Statutes, be submitted to the parties as the persons from which the board of arbitration to determine such dispute shall be elected, to-wit: Nathan P. Feinsinger, [fol. 22] Madison, Wisconsin; Herman Runge, Sheboygan, Wisconsin; Carl J. Ludwig, Milwaukee, Wisconsin; Milton LaPour, Racine, Wisconsin; and Carl Rix, Milwaukee, Wisconsin.

It is further ordered that the representatives of the Milwaukee Gas Light Company and the United Gas, Coke & Chemical Workers of America, Local No. 18, affiliated with

the Congress of Industrial Organizations meet at the Court House in the City of Milwaukee, County of Milwaukee, Wisconsin, on Friday, October 7, 1949, at 10:00 o'clock in the forenoon, at which time each party may strike the name of one person from the list of names submitted above. The remaining three persons will be designated by the Board as the Board of Arbitration to which will be submitted the issues in dispute between the parties.

Given under our hands and seal at the City of Madison, Wisconsin, this 3rd day of October, 1949.

Wisconsin Employment Relations Board, by (S.) L. E. Gooding, Chairman; J. E. Fitzgibbon, Commissioner; Henry C. Rule, Commissioner.

[fol. 23] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

[Title omitted]

ORDER TO SHOW CAUSE—Filed October 4, 1949

Upon the affidavit hereto attached, the verified complaint, and upon motion of Max Raskin, attorney for the plaintiffs,

It is ordered that the defendants show cause, if any they have, on the 6th day of October, 1949, at 3:00 o'clock P. M. or as soon thereafter as counsel can be heard, in the United States District Court for the Eastern District of Wisconsin, in the Federal Building, 517 East Wisconsin Avenue, Milwaukee, Wisconsin, why the defendants, and each of them, should not be restrained and enjoined from taking any action or proceeding, or make any threats to take any action or proceeding, which has for its purpose the compelling of plaintiffs to submit to arbitration or to enter into a labor contract against their will and judgment, or to petition any court of record or file any complaint seeking to compel [fol. 24] the plaintiffs to submit to arbitration, or to take any steps or file any complaint, or pursue any proceeding which will seek to keep the plaintiffs at their place of employment under penalty of confinement in the common jail.

Let a copy of this verified complaint, affidavit and order to show cause be served upon the said defendants at least 24 hours before the return day thereof.

Robert E. Tehan, Judge of the U. S. District Court.

Dated at Milwaukee, Wisconsin. October 4, 1949.

[fol. 25] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

[Title omitted]

ANSWER—Filed October 28, 1949

For answer to the amended complaint in the above entitled action, the Milwaukee Gas Light Company, one of the defendants therein, by its attorneys:

1. Admits the allegations contained and set forth in paragraphs 1 to 16, inclusive, of said amended complaint.

2. Admits the allegations contained and set forth in paragraph 17 of said amended complaint, except that it alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averment that the plaintiffs are authorized to bring this action.

3. Admits the allegations contained and set forth in para-
[fol. 26] graphs 18 to 26, inclusive, of said amended complaint.

4. Denies that the action of the plaintiffs referred to in paragraph 27 of said amended complaint was due to or caused by any failure of this defendant to compromise upon or agree to wages, pensions and other working conditions; and denies that the picketing referred to in said paragraph of said amended complaint was peaceful picketing.

5. With reference to paragraph 28 of said amended complaint, admits that on October 13, 1949, in an action commenced in the Circuit Court for Milwaukee County on or about October 5, 1949, in which the Wisconsin Employment Relations Board was plaintiff and this answering defendant,

Glenn R. Chamberlain, its President, Bernard T. Franck, its Vice-President, and Paul J. Imse, its Secretary and Treasurer, the plaintiff Union herein, and the plaintiffs Arthur St. John, Chester Walczak and Thomas Lansing herein were defendants, an order was entered by said Circuit Court for Milwaukee County, Wisconsin, under which the said Union, the said Arthur St. John, and said Chester Walczak, and the said Thomas Lansing were enjoined to desist and refrain from calling a strike or going out on a strike, or causing any work stoppage or slowdown which would cause an interruption in the service of this defendant, or of a certain corporation known as Milwaukee Solvay Coke Company, from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of such service, and from picketing, or causing to be picketed, the premises of said Milwaukee Solvay Coke Company, and ordering said defendant Union and said defendants Arthur St. John, Ches- [fol. 27] ter Walczak and Thomas Lansing to take immediate steps to notify all employees called out on strike to resume further service; and in all other respects denies the allegations contained in the first sentence in said paragraph 28 of said amended complaint; and denies that the Circuit Court for Milwaukee County had no jurisdiction of the subject matter of the suit in which such restraining order was issued; and denies that Subchapter III of Chapter 111 of the Wisconsin Statutes of 1947 is in conflict with the United States Labor-Management Act of 1947, or with the declared public policy of the United States.

6. With respect to paragraph 29 of said amended complaint, this defendant admits that an order has been issued by said Circuit Court for Milwaukee County requiring the plaintiffs herein and certain other employees of this defendant to show cause why they should not be punished for violating the injunctional order referred to in paragraph 5 of this answer.

7. With respect to paragraph 30 of said amended complaint, admits on information and belief that the defendant Attorney General of the State of Wisconsin will invoke whatever penalties are prescribed under Subchapter III of Chapter 111 of the Wisconsin Statutes of 1947; and denies that any threatened action on behalf of said defendant Attorney General in that connection is unlawful; and

denies that such action is repugnant to the Constitution or laws of the United States.

8. With respect to paragraph 31 of said amended complaint, this defendant denies that it has threatened to invoke any of the provisions of Chapter 111 of the Wisconsin Statutes of 1947; but admits that it will, if need be, invoke any of the remedial provisions of said Chapter 111; and denies that it seeks to compel the plaintiffs to agree to any pension [fol. 28] plan; but admits that if an impasse or stalemate should arise in negotiations between it and said Union with reference to a pension plan, it will, if need be, invoke the provisions of said Subchapter III of said Chapter 111 with reference to the appointment of arbitrators.

9. With respect to paragraph 32 of said amended complaint, admits that the defendants L. E. Gooding, J. E. Fitzgibbon, Henry C. Rule and Thomas E. Fairchild will take whatever steps are warranted by law under said Chapter 111 of the Wisconsin Statutes of 1947 with reference to the submission of any unresolved issue to arbitration; but alleges that it has no knowledge or information sufficient to form a belief as to what action may be demanded by them with reference to confinement in jail.

10. Admits the allegations contained and set forth in paragraph 33 of said amended complaint.

11. Admits the allegations contained and set forth in paragraph 34 of said amended complaint.

12. Denies that the order, or the threatened action referred to in paragraph 35 of said amended complaint, is or are in conflict with the United States Labor-Management Relations Act of 1947, or repugnant to the Constitution of the United States.

13. Admits the allegations contained and set forth in paragraph 36 of said amended complaint.

14. Denies the allegations contained and set forth in paragraph 37 of said amended complaint.

15. Denies the allegations contained and set forth in paragraph 38 of said amended complaint.

16. Denies the allegations contained and set forth in [fol. 29] paragraph 39 of said amended complaint.

17. Denies the allegations contained and set forth in paragraph 40 of said amended complaint.

18. Admits the allegations contained and set forth in paragraph 41 of said amended complaint.

19. With reference to paragraph 42 of said amended complaint, denies that there is a real and justiciable case or an actual controversy between the plaintiffs and the defendants for the reason that said controversy has been submitted by and on behalf of the plaintiffs to and determined by the Circuit Court for Milwaukee County in an action commenced therein, the judgment in which action is *res judicata* against the plaintiffs in this action, as more particularly appears by paragraph 22 of this answer. Denies that the defendant Board or the defendant Attorney General are threatening to enforce an Act which is unconstitutional or void, or are acting outside their authority as officers of the State of Wisconsin; denies that the plaintiffs have no adequate or timely remedy at law; and, on the contrary, alleges that the plaintiffs have already invoked the jurisdiction of and obtained a judgment in the Circuit Court for Milwaukee County, Wisconsin, which is conclusive against them, as hereinafter stated; and denies that the plaintiffs are being or will be deprived of any rights under the Constitution or the laws of the United States, or the enjoyment of the rights of free citizens of the United States.

20. With reference to paragraph 43 of said amended complaint, denies that this suit offers the plaintiffs the only [fol. 30] remedy to secure an adjudication of the validity of Subchapter III of Chapter 111 of the Wisconsin Statutes of 1947 in time to exercise their rights as citizens of the United States; and, on the contrary, alleges that before the commencement of this action they invoked the jurisdiction of the Circuit Court for Milwaukee County in an action for a declaratory judgment and injunction in which action it was adjudged that they were not entitled to the relief asked, and that such judgment is *res judicata* as to the claims asserted in this action.

21. With reference to paragraph 44 of said amended complaint, denies that the civil rights of the plaintiffs have been or are being restricted or abridged, or that they are being denied the freedom of speech, or the right of peaceful assembly and petition; and denies that any act of

the defendants limits the freedom of any of the plaintiffs, or the persons whom they represent, to join in a labor organization, or to make effective use of any joint action on their part, or deprives them of their liberty or their property without due process of law, or prevents them from entering into contracts of employment by their own acts, or prohibits them from the right of contract, or discriminates against them by reason of their being employees of a public utility, or prohibits them from using their joint efforts in arriving at a voluntary labor contract covering their wages, hours or other conditions of employment, or deprives them of the equal protection of the law; and denies that any such classification as is referred to in said paragraph is arbitrary, discriminatory, invidious or repugnant to the Constitution of the United States, or unlawfully invades their rights or liberties by seeking to compel them to remain at their place of employment, or otherwise, or that such acts are in violation of or repugnant to the laws or Constitution of the United States.

[fol. 31] 22. Further answering said amended complaint, this defendant alleges the facts set forth in this paragraph and the sub-paragraphs thereof.

(a) On or about September 3, 1948, the plaintiff Local 18, United Gas, Coke & Chemical Workers of America commenced an action in the Circuit Court for Milwaukee County, Wisconsin as plaintiff against the Wisconsin Employment Relations Board and the Milwaukee Gas Light Company, two of the defendants in the above entitled action, praying the court to determine and declare the rights of the parties, and to declare Subchapter III of Chapter 111 of the Wisconsin Statutes of 1947 unconstitutional and invalid, and to give such further relief by way of declaration of the rights of the parties as might be lawful, just and proper.

(b) On or about October 13, 1948, the summons in said action so commenced in the Circuit Court for Milwaukee County was amended by adding thereto as one of the plaintiffs, Thomas Lansing, who is one of the plaintiffs in this action.

(c) At the same time an amended complaint was served therein, a copy of which amended complaint is hereunto annexed, marked Exhibit "A" and made part hereof as fully as if the same were herein set forth at length. As

appears by said amended complaint, said plaintiff Union brought said action as the representative of the employees of the defendant Milwaukee Gas Light Company, being specifically authorized so to do; and that it was therein alleged that said Thomas Lansing had, through many years, built up a property right in his employment commonly known as "seniority," and it was therein charged that Sections 111.62 and 111.63 of said Chapter 111 of the Wisconsin Statutes of 1947 threatened to destroy said prop-
[fol. 32] erty right by denying him the full protection of the law.

(d) On November 1, 1948, the defendant Milwaukee Gas Light Company interposed in said action a demurrer which, omitting venue, title and signature, reads as follows:

> "Now comes the Milwaukee Gas Light Company, one of the defendants in the above entitled action, by Miller, Mack & Fairchild, its attorneys, and demurs to the amended complaint therein on the ground that it appears on the face of said amended complaint that the same does not state facts sufficient to constitute a cause of action."

(e) On or about October 29, 1948, the defendant Wisconsin Employment Relations Board interposed in said action a demurrer which, omitting venue, title and signature, reads as follows:

> "Now comes the Wisconsin Employment Relations Board one of the respondents above named by its attorneys Grover L. Broadfoot, Attorney General Stewart G. Honeck, Deputy Attorney General and Beatrice Lampert, Assistant Attorney General and demurs to the amended complaint in the above entitled action on the grounds that it appears on the face of said amended complaint that the same does not state facts sufficient to constitute a cause of action."

(f) Said action was brought to trial on the issues of law raised by the separate demurrers of the defendants therein to said amended complaint, and was heard on the 22nd and 26th days of November, 1948, all of the parties to said action having been represented in court by their respective counsel.

(g) On January 6, 1949, the said Circuit Court for Milwaukee County, Wisconsin, being of the opinion that

Subchapter III of Chapter 111 of the Wisconsin Statutes of 1947 was a valid act, and not in violation of nor in conflict with any provision of the Constitution of the State of Wisconsin, nor of the Constitution of the United States, nor of any amendment thereto, and not in conflict with the United States Labor-Management Relations Act of 1947, and being further of the opinion and having determined that any further amendment of said amended complaint [fol. 33] would be unavailing, ordered that said demurrers to the amended complaint in said action be sustained, and that judgment be entered declaring the rights of the parties, and denying the prayer of the plaintiffs for further relief.

(h) On January 6, 1949, said Circuit Court for Milwaukee County, Wisconsin, entered a judgment determining that said Subchapter III of Chapter 111 of the Wisconsin Statutes of 1947 was a valid and constitutional act; that it did not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendments thereto; and did not conflict with the United States Labor-Management Relations Act of 1947; and did not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, and did not deprive them of any rights, privileges or protection secured to them under either of said constitutions or of said act of Congress; and that the plaintiffs in said action, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs therein, were subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes of 1947; and further adjudged that the prayer of the plaintiffs in said action for further relief be and the same was thereby denied. A true copy of said judgment, marked Exhibit "B", is hereunto annexed and made part hereof as fully as if herein set forth at length.

(i) An appeal was taken from the judgment so entered on January 6, 1949 by the plaintiffs in said action to the Supreme Court of the State of Wisconsin; that thereafter such proceedings were had in said Supreme Court of the State of Wisconsin that said judgment of said Circuit [fol. 34] Court for Milwaukee County was affirmed, such judgment of affirmance having been entered on July 12,

1949; and that the remittitur from said Supreme Court was returned to and filed in the office of the Clerk of the Circuit Court for Milwaukee County, Wisconsin, with no accompanying opinion, declaring that, on consideration of the appeal, it was order- and adjudged by said Supreme Court that the judgment of said Circuit Court of Milwaukee County be and the same was affirmed.

(j) No application by appeal, writ of error, certiorari or otherwise to have said judgment reviewed by the Supreme Court of the United States of America has been made.

(k) The said judgment of the Circuit Court for Milwaukee County so affirmed by the Supreme Court of the State of Wisconsin is a final judgment, and is conclusive upon the plaintiffs in this action, and is *res judicata* as to all the issues presented in this action, and as to all relief now sought in this action.

Wherefore, the defendant Milwaukee Gas Light Company prays judgment dismissing the amended complaint, and for its costs and disbursements herein.

J. G. Hardgrove, Vernon A. Swanson.

Miller, Mack & Fairchild, Of Counsel.

[fol. 35] *Duly sworn to by Bernard T. Franck. Jurat omitted in printing.*

[fol. 36] EXHIBIT "A" TO ANSWER

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

Case No. 216361

UNITED GAS, COKE & CHEMICAL WORKERS OF AMERICA, LOCAL 18, affiliated with the C.I.O., and THOMAS LANSING, Plaintiffs,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD and MILWAUKEE GAS LIGHT COMPANY, a Corporation, Defendants

AMENDED COMPLAINT

Now comes the plaintiffs above named, by Max Raskin, their attorney, and for a cause of action against the above named defendants allege and show unto the court as follows:

1. That the plaintiff, United Gas, Coke & Chemical Workers of America, Local 18, affiliated with the C.I.O., is a voluntary labor organization, organized and existing for the purpose of representing employees in matters affecting wages, hours and other conditions of employment and otherwise to engage in collective bargaining for and on behalf of employees with their employer, and brings this action as the representative of the employees of the defendant Milwaukee Gas Light Company, being specifically authorized so to do.

2. That the plaintiff, Thomas Lansing, for many years past, has been and now is an employee of the defendant, Milwaukee Gas Light Company.

3. That the defendant, Milwaukee Gas Light Company, hereinafter referred to as the employer, is a public utility corporation organized under the laws of the State of Wisconsin, and is engaged in the business of furnishing essential service such as light, heat and gas to the public in the state of Wisconsin.

[fol. 37] 4. That the Wisconsin Employment Relations Board, hereinafter referred to as the Board, is created pursuant to Chapter 111 of the Laws of 1947 and is charged with the enforcement of Section 111.62 of the Wisconsin Statutes.

5. That the plaintiff union is the bargaining representative of the employees who are engaged in production, and maintenance work in the Meter Shop, Service Shop, Third Ward Works, Street Department, West Works and the Meter Reading Department, and that all of such employees are performing essential services to the public as set forth in Section 111.51 of the Wisconsin Statutes.

6. That on August 4th, 1947, the plaintiff union and the employer entered into a contract covering rates of pay, hours of work and the other conditions of employment, but that such contract duly terminated on June 1st, 1948.

7. That prior to June 1st, 1948, the plaintiff union and the employer engaged in negotiations for the purpose of executing a new contract covering the period from June 1st, 1948, to June 1st, 1949.

8. That Section 111.62, Wisconsin Statutes, prohibits all of the employees represented by the plaintiff union from calling or going on strike or quitting work in concert, or from causing any work stoppage, in any essential service.

9. That this prohibition deprives all of the employees represented by the plaintiff union of their only effective means of bargaining collectively, and destroys their constitutional rights to place their own price on their services.

10. That this prohibition was in effect at all times during the above mentioned negotiations, and seriously hampered and injured the plaintiff union in its collective bargaining efforts.

11. That all future attempts by the plaintiff union, as [fol. 38] representative of the employees of the defendant company will be hampered and injured by this prohibition.

12. That negotiations between the plaintiff union and the defendant employer for a new contract, covering wages, hours and other conditions of employment for the period subsequent to June 1st, 1949, will necessarily be entered into in the near future.

13. That Section 111.62, Statutes, provides that any of the employees of the defendant employer violating this section shall be guilty of a criminal offense.

14. That acting in concert is the only possible method by which collective bargaining can be carried on.

15. That the plaintiff union represents the employees of the defendant employer as a group, and as individuals, in any matter relating to collective bargaining for wages, hours, and other working conditions.

16. That the plaintiff, Thomas Lansing, has through many years, built up a property right in his employment, commonly known as "Seniority"; that Section 111.62 and Section 111.63 threaten to destroy this property right by denying him the full protection of the law.

17. That the plaintiffs are informed and believe, and allege the fact to be, that the employer has and will petition the Board, pursuant to Section 111.54 of the Wisconsin Statutes.

18. That the defendant Board claims jurisdiction of the employer and the union, with the right to enjoin and restrain the union and its members from quitting in concert, to call a strike, or go out on strike, or cause any work stoppage.

19. That the position taken by the employer and the Wisconsin Employment Relations Board, that the employees are prohibited from quitting work in concert, completely destroys their right to effectively bargain collectively for [fol.39] their wages, hours and working conditions, by compelling them to remain at work without their consent and against their will.

20. That sub-chapter III of Chapter 111 of the Laws of 1947, and particularly Section 111.62, is unconstitutional, invalid, and in conflict with Section 1, Article 1, Section 2, Article 1, Section 4, Article 1 and Section 22, Article 1 of the Constitution of the State of Wisconsin, and the 13th Amendment to the Constitution of the United States.

21. That the defendant company, upon information and belief, is engaged in the production of goods and the furnishing of services affecting commerce, and that the furnishing of such services affect and control the flow of raw materials, or manufactured or processed goods in inter-state commerce.

22. That the said defendant company, and its employees, are subject to and affected by the National Labor Relations Act as Amended on June 23rd, 1947, by the Congress of the

United States, otherwise known as the Labor Management Relations Act of 1947.

23. That sub-chapter III of Chapter 111 of the Laws of 1947, is in conflict with the United States Labor Management Relations Act of 1947 and therefore does not affect or control the conduct of the plaintiffs and the defendant company with respect to labor management relations.

Wherefore plaintiff prays that the court determine and declare the rights of the parties, and declare sub-chapter III of Chapter 111 of the Laws of 1947, Wisconsin Statutes, unconstitutional and invalid, and give such further relief as may be lawful, just and proper, by way of declaration of the rights of the parties.

Max Raskin, Plaintiffs' Attorney.

[fol. 40] *Duly sworn to by Thomas Lansing. Jurat omitted in printing.*

[fol. 41] EXHIBIT "B" TO ANSWER

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

No. 216-361

UNITED GAS, COKE & CHEMICAL WORKERS OF AMERICA, LOCAL 18, Affiliated With the C.I.O., and Thomas Lansing, Plaintiffs,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD and MILWAUKEE GAS LIGHT COMPANY, a Corporation, Defendants

JUDGMENT

The above entitled action having been brought to trial on the issues of law therein raised by the separate demurrers of the defendants to the amended complaint therein; and having been heard on the 22nd and 26th days of November, 1948, at the Court House in the City and County of Milwaukee, Wisconsin, the Honorable Daniel

W. Sullivan, Circuit Judge, presiding; Beatrice Lampert, Assistant Attorney General, having appeared for the defendant Wisconsin Employment Relations Board in support of its demurrer to said amended complaint; Miller, Mack & Fairchild, represented by J. G. Hardgrove and Charles H. Oldfather, Jr., having appeared as attorneys for the defendant Milwaukee Gas Light Company in support of its demurrer to said amended complaint; and Max Raskin and William F. Quick having appeared as attorneys for the plaintiffs in opposition to said demurrers; and the court having heard the arguments of counsel and being advised in the premises; and having entered an order sustaining each of said demurrers to said amended complaint, and directed the entry of judgment declaring the rights [fol. 42] of the parties and dismissing the above entitled action on the merits; and the court having found that Chapter 414, Laws of 1947, being subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid act and not in violation of nor in conflict with the Constitution of the State of Wisconsin, nor of the Constitution of the United States, nor of any amendment thereto, and not in conflict with the United States Labor-Management Relations Act of 1947; Now, Therefore,

It Is Hereby Adjudged and Determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947, and does not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, and does not deprive them of, any rights, privileges or protection secured to them under either of said constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947.

It Is Further Adjudged that the prayer of the plaintiffs [fol. 43] in the above entitled action for further relief be and the same hereby is denied.

Dated Milwaukee, Wisconsin, January 6th, 1949.

By the Court. Fred J. Jaeger, Clerk, By Harold H. Gruettner, Deputy Clerk.

Let the foregoing judgment be entered.

Daniel W. Sullivan, Circuit Judge.

[fol. 44] In the District Court of the United States for the Eastern District of Wisconsin

Answer on Behalf of State Official Defendants—Filed November 8, 1949

1. This answer is made on behalf of defendants Wisconsin Employment Relations Board, L. E. Gooding, J. E. Fitzgibbon and Henry C. Rule, individually and as Commissioners constituting the Wisconsin Employment Relations Board, and Thomas E. Fairchild, individually and as Attorney General of the State of Wisconsin, hereinafter referred to as "state official defendants".

2. State official defendants admit the averments contained in paragraphs 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 29, 33, 34, 36, subparagraph (a) of paragraph 2 and the first subparagraph of paragraph 28 of the amended complaint.

[fol. 45] 3. The state official defendants deem the averments hereinafter referred to to be conclusions of law but insofar as they may be held to be averments of fact deny the same: paragraphs 1, 35, 37, 38, 39, 40, 41, 42, 43 and 44, subparagraphs (b) and (c) of paragraph 2 and the second subparagraph of paragraph 28 of the amended complaint.

4. The state official defendants admit the averment of paragraph 16 of the amended complaint, that defendant Milwaukee Gas Light Company is a public utility employer and is primarily engaged in furnishing illuminating and heating gas to the general public in the city and county of Milwaukee, Wisconsin. They deny the averment that

the company is engaged in commerce as defined in 29 U.S.C.A. 152(6) and deny that the term "trade affecting commerce" is defined in 29 U.S.C.A. 152 (7) and deny the averment that the company is engaged in trade affecting commerce as so defined. They allege that the National Labor Relations Board has made no determination that a dispute between the company and its employees, the same being subjected to the provisions of subchapter III of chapter 111, Wis. Stats., affects commerce.

5. The state official defendants allege that should acts of plaintiffs or others in the future constitute violations of subchapter III of chapter 111, Wis. Stats., the defendant attorney general would then act in accordance with the provisions of statute covering duties of his office, and in all other respects deny the averment contained in paragraph 30 of the amended complaint.

6. State official defendants admit the averment of paragraph 31 of the amended complaint as to the agreement on October 6, 1949 between plaintiff union and the de-[fol. 46] fendant company but they have no knowledge or information sufficient to form a belief as to any threat by the defendant company to invoke the provisions of subchapter III, chapter 111, Wis. Stats., to compel the plaintiffs to agree to a pension plan.

7. State official defendants allege that in the event the unresolved issue of pensions appears to approach an impasse or stalemate, they will take such action as may be required to enforce the provisions of subchapter III, chapter 111, Wis. Stats., but in all other respects deny the averments of paragraph 32 of the amended complaint.

8. (a) On or about September 3, 1948, the union commenced an action against Wisconsin Employment Relations Board and Milwaukee Gas Light Company in the circuit court of the state of Wisconsin for Milwaukee county, Wisconsin, a court of competent jurisdiction, and later plaintiff Lansing joined as an additional plaintiff in that action, hereinafter called "declaratory judgment action". The amended complaint in the declaratory judgment action alleged among other things that the plaintiff union brought the action as the representative of the employes of the defendant Milwaukee Gas Light Company, being specifically authorized so to do; that the defendant company is

a public utility corporation engaged in the business of furnishing essential service such as light, heat and gas to the public in the state of Wisconsin; that the plaintiff union is the bargaining representative of certain employes of the company performing essential services to the public; that the Wisconsin Employment Relations Board claims jurisdiction of the company and the union with the right to enjoin and restrain the union and its members from quitting in concert to call a strike or go out on strike or cause any [fol. 47] work stoppage; that subchapter III of chapter 111 of the Laws of 1947 is unconstitutional and in conflict with the Thirteenth Amendment to the Constitution of the United States; that the company is engaged in the production of goods and the furnishing of services affecting commerce and that the furnishing of such services affect and control the flow or raw materials, of manufactured or processed goods in interstate commerce; that subchapter III of chapter 111 is in conflict with United States Labor Management Relations Act of 1947 and therefore does not affect or control the conduct of the plaintiff and the company with respect to labor management relations. The complaint prayed for a declaration of the rights of the parties and a declaration that said subchapter is unconstitutional. After trial of the declaratory judgment action on the issues of law raised by the demurrers of defendants to the amended complaint therein, the circuit court entered judgment as follows:

> "*It is Hereby Adjudged and Determined* that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947, and does not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, and does not deprive them of any rights, privileges or protection secured to them under either of said constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its em-

ployees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947.

"*It Is Further Adjudged* that the prayer of the plaintiffs in the above entitled action for further relief be and the same hereby is denied."

[fol. 48] (b) The said judgment of the circuit court for Milwaukee county was affirmed by the supreme court of Wisconsin on appeal on July 12, 1949. No review of the said judgment by the supreme court of the United States has been sought by appeal or writ of certiorari. A true copy of said amended complaint and of said judgment are hereunto annexed, marked Exhibits A and B and made a part hereof.

(c) The issues raised by the pleadings in this action were raised by the amended complaint and demurrer in the declaratory judgment action and fully argued upon the trial and the said final and unreversed judgment therein is a full and final adjudication between the parties hereto of all the issues sought to be raised by plaintiffs in this action and is a bar and complete defense herein.

Wherefore the state official defendants pray that the amended complaint be dismissed.

Thomas E. Fairchild, Attorney General, In his own proper person and as attorney for defendants Wisconsin Employment Relations Board, L. E. Gooding, J. E. Fitzgibbon and Henry C. Rule. Stewart G. Honeck, Deputy Attorney General. Beatrice Lampert, Assistant Attorney General, Attorneys for defendants Wisconsin Employment Relations Board, L. E. Gooding, J. E. Fitzgibbon and Henry C. Rule, and Thomas E. Fairchild.

P. O. Address: State Capitol, Madison 2, Wisconsin.

[fols. 49-51] Exhibit "A" Omitted. Printed side page 41 ante.

[fols. 52-56] Exhibit "B" Omitted. Printed side page 36 ante.

[fol. 57] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

[Title omitted]

SECOND STIPULATION AS TO FACTS—Filed December 16, 1949

The parties to the above entitled action by their respective counsel stipulate as follows:

I. This second stipulation is made at the request of the Court and by agreement of the parties and is to take the place of the stipulation originally filed in this action dated November 23, 1949.

II. This stipulation is made for the purpose of submitting the case to the court in lieu of trial of issues of fact and [fol. 58] limiting the trial herein to issues of law. The court's findings and conclusions shall have the same force and effect as though all issues of fact had been fully tried on proper notice.

III. Each party reserves the right to object to the relevancy and materiality of any fact stated in this stipulation.

IV. Each party waives any right to introduce evidence before the court in this action except as the court may at its discretion permit, and except that the defendant company reserves the right to offer in evidence an exemplified copy of the opinion of the trial court in the State Court action referred to in paragraph 7 hereof.

V. The following statements are true and findings may be based thereon subject to the right of each party to object on the grounds of relevancy and materiality as hereinabove reserved:

1. That the matter is controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3000.00) pursuant to Section 1331 of Title 28 of the U. S. C. A.

2. That the plaintiff, Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and hereinafter referred to as the union, is an unincorporated association of employees employed in the production, maintenance, operation, construction and meter reading, of approximately seven hun-

dred seventy (770) in number, all of whom are employed with the defendant, Milwaukee Gas Light Company, and that the office of the said union is in the city of Milwaukee, Milwaukee County, Wisconsin; that it is a labor organization as defined in Section 2 (5) of the Labor Management Relations Act of 1947.

3. That the plaintiff, Chester Walczak, is a citizen of the United States and a resident of the city and county of Milwaukee, Wisconsin, residing at 3350 North Richards Street, and is the International Representative of said union.

[fol. 59] 4. That the plaintiff, Arthur St. John, is a citizen of the United States, and a resident of Waukesha County, Wisconsin, residing at Route 12, Box 529, and is the President of the said union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Five Hundred Dollars ($3500.00).

5. That the plaintiff, Al Fuhrman, is a citizen of the United States, and a resident of Milwaukee County, Wisconsin, residing at 6308 Beloit Road, West Allis 14, and is the vice president of the said union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Three Hundred Dollars ($3300.00).

6. That the plaintiff, Emil Heimsch, is a citizen of the United States, and a resident of Milwaukee, Wisconsin, residing at 1054 North 46th Street, and is the Chairman of the Bargaining Committee of the union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Seven Hundred Dollars ($3700.00).

7. That the plaintiff, Thomas Lansing, is a citizen of the United States, and a resident of Milwaukee, Wisconsin, residing at 2779 South Superior Street, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Five Hundred Dollars ($3500.00).

8. That the plaintiff, John F. Sheehan, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, reading at 2518 South 11th Street, Milwaukee, and is a

member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately [fol. 60] Three Thousand Two Hundred Dollars ($3200.00).

9. That the plaintiff, E. F. Regner, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 2371 South 79th Street, West Allis 14, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand Three Hundred Dollars ($3300.00).

10. That the plaintiff, Edward P. Regan, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 2933 North Cramer Street, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand One Hundred Dollars ($$100.00).

11. That the plaintiff, La Moine S. Cardinal, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 1435 West Kilbourn Avenue, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Thirty Two Hundred Dollars ($3200.00).

12. That the plaintiff, Gordon Donnelly, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, residing at 2134A North 2nd Street, and is the recording secretary of said union. That he is an employee of the Milwaukee Gas Light Company and has earned annually from said company approximately Three Thousand One Hundred Dollars ($3100.00).

13. That the defendant, L. E. Gooding, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city [fol. 61] of Fond du Lac, Winnebago County, Wisconsin. The defendant, J. E. Fitzgibbon, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the City

of Milwaukee, Milwaukee County, Wisconsin. The defendant, Henry C. Rule, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city of Eau Claire, Eau Claire County, Wisconsin. That all of said defendants constitute the Wisconsin Employment Relations Board, which has offices at 110 East Wisconsin Avenue, Milwaukee, Wisconsin. That said Wisconsin Employment Relations Board is established pursuant to and under the statutes of the state of Wisconsin, Section 111.03, Wis. Stats. of 1947, and is composed of the aforesaid commissioners; that said Board has for its duty the enforcement and compliance with subchapter 3 of chapter 111 of the Laws of the State of Wisconsin titled "Public Utilities" as set forth in sections 111.50 through 111.64 Wisconsin Statutes of 1947.

14. That the defendant, Thomas E. Fairchild, is the duly elected qualified and acting Attorney General of the State of Wisconsin, and as such is charged with the enforcement of the laws of the State of Wisconsin, is a citizen of the United States and is a resident of the village of Verona, Dane County, Wisconsin.

15. That the annual earnings of all of such members of the union as employees of the defendant company is approximately Two Million Three Hundred Ten Thousand Dollars ($2,310,000.00).

16. That the members of the union, including the plaintiffs, have assembled and associated themselves in the said union for the purpose of collective bargaining and otherwise dealing with the defendant company concerning hours [fol. 62] of employment, rates of pay, pensions, working conditions, grievances arising out of employment, and for other mutual aid and protection, and by such means to improve their economic and social conditions as citizens of the United States.

17. The Labor Management Relations Act of 1947, adopted by the Congress, is a law regulating commerce as set forth in Section 101 and Section 204 of the Act as amended. That since 1937, to August 1st, 1943, the defendant company recognized the plaintiff union as the exclusive bargaining representative for all of its employees performing production and maintenance work, for the purpose of

bargaining with respect to rates of pay, hours of employment, and other conditions of employment, and that on August 1st, 1943, the plaintiff union was duly certified by the National Labor Relations Board, acting under the National Labor Relations Act of 1935, as the exclusive bargaining representative for all of the employees of the defendant company in said unit, for the purpose of bargaining with respect to rates of pay, hours of employment, and other conditions of employment.

18. That commencing with June, 1937, and annually thereafter including June, 1948, the plaintiff union and the defendant company entered into collective bargaining agreements for wages, hours of employment, and other working conditions of all of the employees represented by the said union.

19. That the most recent of such contracts was entered into between the plaintiff union and the defendant Company on September 24th, 1948, which by its terms remained in full force and effect until June 1st, 1949, and from year to year thereafter unless terminated by written notice on or before April 1st, of any year; that the plaintiff union terminated said agreement as of June 1st, 1949, by written notice [fol. 63] to the defendant company prior to April 1st, 1949, as required by Section 8 (d) of the Labor Management Relations Act of 1947.

20. That the Federal Mediation and Conciliation Service, acting under the Notice of Termination of Contract, copy of which was submitted to it, intervened and proceeded to assist in the negotiation of a contract for the year 1949-50.

21. That the probable earnings of all of such employees represented by the plaintiff union for a contemplated contract for the year 1949-50 is Two Million Three Hundred Ten Thousand Dollars ($2,310,000.00).

22. That on September 19th, 1949, the plaintiff union filed a petition with the National Labor Relations Board, charging the defendant company with having violated Section 8 (a) (5) of the Labor Management Relations Act of 1947, in that it was guilty of an unfair labor practice for having failed and refused to bargain collectively with the plaintiff union, the duly authorized bargaining representative of the majority of the employees in the bargaining unit, and that

such petition is now pending before the National Labor Relations Board.

23. That subsequent to the filing of the aforesaid petition with the National Labor Relations Board, defendant company did enter into collective bargaining with the plaintiff union covering wages, pensions, hours and other conditions of employment.

24. That the defendant Attorney General, together with the defendant Wisconsin Employment Relations Board, has since caused the issuance of process to punish the plaintiffs and other employees of the defendant company for whom this action is brought, for allegedly violating the injunction of the circuit court and subchapter 3, chapter 111 of the Wisconsin Statutes, of 1947; that unless the relief prayed for herein is granted by this court the plaintiffs and [fol. 64] others for whom they are authorized to act, will be subjected to fines or imprisonment, or both.

25. That on the 28th day of September, 1949, the defendant company filed with the Wisconsin Employment Relations Board, a petition, a copy of which is attached to the amended complaint and marked Exhibit "A".

26. That on October 3rd, 1949, the defendant, Wisconsin Employment Relations Board, issued an order, a copy of which is attached to the amended complaint and marked Exhibit "B", directing the plaintiffs to choose arbitrators as provided in subchapter 3, Chapter 111 of Wisconsin Statutes of 1947, and that such order issued under the purported authority of the Wisconsin Statutes has not been revoked, and remains as threatened by the Wisconsin Employment Relations Board, binding upon the plaintiffs.

27. That the Wisconsin Employment Relations Board and the defendant company claim to act under authority of subchapter 3 of Chapter 111 of the Laws of the State of Wisconsin, 1947.

28. (a) That the defendant company is a Wisconsin corporation, and is a public utility employer with offices located at 626 East Wisconsin Avenue, Milwaukee, Wisconsin; and is primarily engaged in the furnishing of illuminating and heating gas to the general public in the cities of Milwaukee, West Bend, West Allis, Wauwatosa, Port Washington and

Hartford, and the villages of Shorewood, West Milwaukee, Whitefish Bay, River Hills, Fox Point, Menomonee Falls, Grafton, Slinger, Thiensville, Germantown, Saukville and Jackson, and the townships between the City of Milwaukee and the said outlying cities and villages in the State of Wisconsin. The total franchise area served exceeds five hundred square miles. The total population of the area is nearly eight hundred thousand. The number of customers exceeds two hundred thousand.

(b) That during the year of 1948 Milwaukee Gas Light Company purchased materials and supplies from vendors [fol. 65] located outside the State of Wisconsin as follows:

Gas oil	$570,059.58
Coke breeze	116,827.32
Natural gasoline	267,842.73
Butane and Propane	1,379,050.22
Pipe and fittings	240,247.25
Appliances and parts	394,495.03
	$2,968,522.13

The Milwaukee Gas Light Company's total purchases during this period, exclusive of coke oven gas, were $6,296,-397.47. Coke over gas during this period, purchased from Milwaukee Solvay Coke Company, (a wholly owned subsidiary), was $2,053,614.90. Accordingly, total purchases of all materials and supplies from vendors both within and outside Wisconsin were $8,350,012.37. During the year of 1948 Milwaukee Gas Light Company sales to industrial customers (most of the large industrial customers being engaged in interstate commerce), amounted to $1,462,636.07. All other sales during that period amounted to $9,384,376.26, or a total sales of $10,847,012.33. Accordingly a substantial portion of the purchases of materials and supplies of Milwaukee Gas Light Company were made from vendors outside the state. Milwaukee Gas Light Company is now converting to natural gas, the source of which is outside the state.

That the company is engaged to the approximate extent above indicated in the production of goods, and the furnishing of services affecting interstate commerce, and the furnishing of such services affect and control, to some degree,

the flow of raw materials, or manufactured or processed goods in interstate commerce.

(c) That on June 24, 1943, an order was entered by the National Labor Relations Board directing an election for the purpose of determining the representative of the employees of the company for collective bargaining (National Labor Relations Board Case No. R-5398). This order was [fol. 66] amended by order of the National Labor Relations Board, dated July 8, 1943, for the purpose of further defining the unit. A supplemental decision and certification of the National Labor Relations Board in this case was entered on October 5, 1943, certifying United Gas, Coke and Chemical Workers of America (CIO) as the representative of the employees of the company in the unit.

An order dated October 30, 1946, was entered by the National Labor Relations Board directing an election with respect to employees of the company in a unit comprised of supervisory employees (National Labor Relations Board Case No. 13-R-3037). At the election conducted pursuant to this order less than a majority of the employees of the unit*ed* voted to be represented by a union.

In both of these cases the National Labor Relations Board found that Milwaukee Gas Light Company was engaged in commerce within the meaning of the National Labor Relations Act.

The National Labor Relations Board has made no determination in any proceedings with respect to any alleged unfair labor practice on the part of the company or its employees.

A petition charging the company with an unfair labor practice has been filed by the plaintiff union with the National Labor Relations Board as alleged in paragraph 25 of the amended complaint. The company has filed with the National Labor Relations Board a written denial of the charge and requested dismissal thereof and no action has been taken by the National Labor Relations Board upon the said petition. Except as otherwise stated in this subparagraph (c), National Labor Relations Board has made no determination in any proceeding that any alleged unfair labor practice on the part of the company or its employes [fol. 67] does or would actually threaten or affect interstate or foreign commerce.

29. That the plaintiffs bring this action on behalf of themselves and all others similarly situated, that is to say, the members of the union who are also employees of the defendant company and are authorized so to do.

30. That on October 5, 1949 the plaintiffs left the employment of the defendant company individually, in concert, and in agreement with others, and commenced the picketing of the company's premises. In recognition of the picket line so maintained, the company's employees refrained from crossing the same and no acts of violence occurred in connection with the maintenance of such picket lines. Prior to such time, negotiations as to the terms of employment had been carried on by plaintiffs and the company, and up to the time immediately prior to such concerted action, the defendant company had not agreed to certain terms offered by plaintiffs, and plaintiffs had not agreed to certain terms offered by defendant company. Such failure to reach an agreement resulted in an impasse which was the reason for said concerted action by plaintiffs and others.

31. That on October 5, 1949 in an action in the name of Wisconsin Employment Relations Board, as plaintiff, against Milwaukee Gas Light Company, Glen R. Chamberlain, President, B. T. Frank, Vice President, P. J. Imse, Secretary-Treasurer, The United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, Affiliated with the C. I. O., Arthur St. John, Chester Walczak and Thomas Lansing, circuit court for Milwaukee county, Wisconsin, issued an order which provided in part as follows:

> "It Is Further Ordered that until the hearing of said order to show cause:
>
> "(a) the defendants, Milwaukee Gas Light Company, Glen R. Chamberlain, B. T. Frank, P. J. Imse, [fol. 68] and each of them, and their employees, servants and agents, do desist and refrain from failing and neglecting to exert every reasonable effort to settle the labor dispute between said company and the representative of its employees and to prevent the collective bargaining process from reaching a state of impasse and stalemate;
>
> "(b) the defendants, the United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Chester

Walczak and Thomas Lansing to absolutely desist and refrain from calling a strike, going out on strike, or cause any work stoppage or slowdown which would cause an interruption of the service of the Milwaukee Gas Light Company or the Milwaukee Solvay Coke Company and from instigating, inducing, conspiring with or encouraging any strike, slowdown or work stoppage which would cause interruption of such service, and from picketing or causing to be picketed the premises of the Milwaukee Solvay Coke Company.

"It Is Further Ordered that until the hearing of said order to show cause the defendants, The United Gas, Coke and Chemical Workers of America, District 7, Local Union 18, affiliated with the C. I. O., Arthur St. John, Chester Walczak and Thomas Lansing, take immediate steps to notify all employees called out on strike to resume service forthwith."

The said order was sought by the state official defendants under the authority of sec. 111.63, Wisconsin Statutes.

32. That each party stipulates for himself that he has no present knowledge that subchapter 3 of ch. 111, Wisconsin Statutes is being violated by the plaintiffs, or the defendant company, at the date of this stipulation. Should such violation occur in the future, the attorney general would perform such duties as are imposed upon him by the Wisconsin Statutes if so required by the Wisconsin Employment Relations Board.

33. That on October 6, 1949, plaintiff union and the defendant company agreed upon wages, hours and other con- [fol. 69] ditions of employment but have not agreed on the exact terms and conditions of the pension plan for the employees of the defendant company for whom the plaintiff union is authorized to bargain. Disagreement on said pension plan was one of the principal issues in dispute on October 5 when the strike took place. If an impasse or stalemate should arise in negotiations between the company and the union with reference to a pension plan, the company will request the Wisconsin Employment Relations Board to perform its duties under subchapter 3, chapter 111, Wisconsin Statutes.

34. If an impasse or stalemate is reached in said negotiations, the Wisconsin Employment Relations Board will take

steps pursuant to subchapter 3, chapter 111, Wisconsin Statutes, to effect a settlement through conciliation or a determination through arbitration, as the case may be, and would take such steps as are authorized and as it would deem necessary to prevent or stop a violation of said subchapter by the defendant company or its employees, including plaintiffs.

35. That on or about September 3, 1948, the plaintiff Local 18, United Gas, Coke & Chemical Workers of America commenced an action in the circuit court for Milwaukee county, Wisconsin as plaintiff against the Wisconsin Employment Relations Board and the Milwaukee Gas Light Company, two of the defendants in the above entitled action, praying the court to determine and declare the rights of the parties, and to declare subchapter 3 of chapter 111 of the Wisconsin Statutes of 1947 unconstitutional and invalid, and to give such further relief by way of declaration of the rights of the parties as might be lawful, just and proper.

36. That on or about October 13, 1948, the summons in said action so commenced in the circuit court for Milwaukee county was amended by adding thereto as one of the plaintiffs Thomas Lansing, who is one of the plaintiffs in this action.

[fol. 70] 37. That at the same time an amended complaint was served therein. As appears by said amended complaint, said plaintiff union brought said action as the representative of the employees of the defendant Milwaukee Gas Light Company, being specifically authorized so to do; and that it was therein alleged that said Thomas Lansing had, through many years, built up a property right in his employment commonly known as "seniority" and it was therein charged that sections 111.62 and 111.63 of said chapter 111 of the Wisconsin Statutes of 1947 threatened to destroy said property.

38. That on November 1, 1948, the defendant Milwaukee Gas Light Company interposed in said action a demurrer which, omitting venue, title and signature, reads as follows:

> "Now comes the Milwaukee Gas Light Company, one of the defendants in the above entitled action, by Miller, Mack & Fairchild, its attorney, and demurs to the amended complaint therein on the ground that it ap-

pears on the face of said amended complaint that the same does not state facts sufficient to constitute a cause of action."

39. That on or about October 29, 1948, the defendant Wisconsin Employment Relations Board interposed in said action a demurrer which, omitting venue, title and signature, reads as follows:

> "Now comes the Wisconsin Employment Relations Board one of the respondents above named by its attorneys Grover L. Broadfoot, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General and demurs to the amended complaint in the above entitled action on the grounds that it appears on the face of said amended complaint that the same does not state facts sufficient to constitute a cause of action."

40. That said action was brought to trial on the issues of law raised by the separate demurrers of the defendants therein to said amended complaint, and was heard on the 22nd and 26th days of November, 1948, all of the parties [fol. 71] to said action having been represented in court by their respective counsel.

41. That on January 6, 1949, the said circuit court for Milwaukee county, Wisconsin, being of the opinion that subchapter 3 of Chapter 111 of the Wisconsin Statutes of 1947 was a valid act, and not in violation of nor in conflict with any provision of the Constitution of the state of Wisconsin, nor the Constitution of the United States, nor of any amendment thereto, and not in conflict with the United States Labor-Management Relations Act of 1947; and being further of the opinion and having determined that any further amendment of said amended complaint would be unavailing, ordered that said demurrers to the amended complaint in said action be sustained, and that judgment be entered declaring the rights of the parties, and denying the prayer of the plaintiffs, for further relief.

42. That on January 6, 1949, said circuit court for Milwaukee county, Wisconsin entered a judgment determining that said subchapter 3 of chapter 111 of the Wisconsin Statutes of 1947 was a valid and constitutional act; that it did not violate nor conflict with any of the provisions of

the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendments thereto; and did not conflict with the United States Labor Management Relations Act of 1947; and did not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, and did not deprive them of any rights, privileges or protection secured to them under either of said constitutions or of said act of Congress; and that the plaintiffs in said action, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs therein, were subject to and controlled by said [fol. 72] subchapter 3 of chapter 111 of the Wisconsin Statutes of 1947; and further adjudged that the prayer of the plaintiffs in said action for further relief be and the same was thereby denied.

43. That an appeal was taken from the judgment so entered on January 6, 1949 by the plaintiffs in said action to the supreme court of the state of Wisconsin; that thereafter such proceedings were had in said supreme court of the state of Wisconsin that said judgment of said circuit court for Milwaukee county was affirmed, such judgment of affirmance having been entered on July 12, 1949; and that the remittitur from said supreme court was returned to and filed in the office of the clerk of the circuit court for Milwaukee county, Wisconsin, with no accompanying opinion, declaring that, on consideration of the appeal, it was ordered and adjudged by said supreme court that the judgment of said circuit court of Milwaukee county be and the same was affirmed.

44. That the opinion of the Supreme Court of Wisconsin with respect to the said appeal was filed in the office of the clerk of that court on July 12, 1949, and is reported under the title: *United Gas, Coke & Chemical Workers of America, Local 18, C.I.O., and another vs. Wisconsin Employment Relations Board and another*, 255 Wis. (Advance Sheets) 154-163, 38 N. W. (2d) (Advance Sheets) 692-697.

45. That no application by appeal, writ of error, certiorari or otherwise to have said judgment reviewed by the supreme court of the United States of America has been made.

46. That it is claimed by defendants that the said judgment constitutes *res judicata* as to all the issues presented in this action and as to all relief now sought in this action but the plaintiffs claim it does not constitute *res judicata*.

[fol. 73] 47. That this court may take judicial notice of the briefs filed in said action in the circuit court of Milwaukee county, in the supreme court of Wisconsin, and of the opinion of the supreme court of Wisconsin. The copies of the amended complaint, and judgment in said action attached to the defendants are true copies.

Dated: —— —, ——

(S.) Max Raskin, Attorney for Plaintiffs. Thomas E. Fairchild, Stewart G. Honeck per tef. Beatrice Lampert per tef, Attorneys for State Official Defendants. J. G. Hardgrove, Vernon A. Swanson, Attorneys for Defendant Company.

[fol. 74] Filed Dec. 30, 1948. Fred J. Jaeger, Clerk.

DEFENDANT'S EXHIBIT "A"

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

No. 216-361

UNITED GAS, COKE & CHEMICAL WORKERS OF AMERICA, LOCAL 18, Affiliated With the C.I.O., and Thomas Lansing, Plaintiffs,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD and MILWAUKEE GAS LIGHT COMPANY, a Corporation, Defendants

Filed Mar. 4, 1949. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

No. 217-441

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY and Motor Coach Employes of America, Division 998, George Koechel, and Charles Brehm, Individually and in Their Representative Capacity, Plaintiffs,

vs.

THE MILWAUKEE ELECTRIC RAILWAY & TRANSPORT COMPANY, a Wisconsin Corporation, and the Wisconsin Employment Relations Board, Defendants

DECISION

The above entitled actions are brought pursuant to Section 269.56 Stats. for a declaration of the rights, status and legal relations of the parties under Chapter 414, Laws of 1947 (Sub. chap. III of Chap 111, Stats.), relating to compulsory arbitration of labor disputes in public utility industries, and for a declaration that said Act is unconstitutional.

[fol. 75] In the action last above entitled, it is alleged that the union is the collective bargaining representative of the employes of the defendant, Transport Company, and that for many years collective bargaining contracts have existed between the parties and that the current contract will expire on December 31, 1948; that, pursuant to

the terms of said contract, each of the parties has given notice of changes which it desires in the renewal contract. Further, it is alleged: "That by virtue of the restrictive, arbitrary, discriminatory and unconstitutional provisions of the Wisconsin Act as aforesaid, including the right of the State under the provisions of the law to impose upon the parties an agreement establishing wages, hours and working conditions, contrary to their desires and requests, plaintiffs and those employes represented by plaintiffs are precluded from engaging in good faith collective bargaining because of the pervading threat of the criminal penalties provided by the law, and the right to injunctive relief provided by the law, and are unable to fully assert their collective strength and to engage in good faith collective bargaining."

The complaint in the action first above entitled alleges that it is the collective bargaining representative of the employees of the defendant Gas Company; that a renewal contract between plaintiff and defendant, Gas Company, was entered into on June 1, 1948, for a period of one year, but that plaintiff union was seriously hampered at that time in its collective bargaining efforts by reason of Sec. 111.62 Stats. (created by Chap. 414, Laws of 1947) which prohibits employes, under penalty of being guilty of a [fol. 76] criminal offense, from calling or going on strike or quitting work in concert, or from causing any work stoppage in any essential service, which thereby prevents employees from exercising their only effective means of bargaining collectively. Further, that plaintiffs are about to begin negotiations with defendant, Gas Company, for a renewal contract and that, if the relief here sought is not granted, they will be similarly handicapped.

In each action it is alleged that the defendant company and its employees are subject to the National Labor Relations Act, as amended on June 23, 1947 (known as the Taft-Hartley Act) and that Chapter 414, Laws of 1947, is violative thereof.

The issues are before the court by a demurrer interposed by defendants in the first above entitled action, and by plaintiffs' demurrer to the answer in the action last above entitled.

The facts alleged satisfactorily show (1) a justiciable controversy, (2) adverse interests of the parties plaintiff

and defendant, (3) a legally protectible interest on the part of each of the plaintiffs, and (4) that the issues are ripe for judicial determination. *State ex rel. LaFollette v. Dammann*, 220 Wis. 17.

Chapter 414, Laws of 1947, creating Secs. 111.50 to 111.65 Stats., was enacted in furtherance of the declared public policy of this state to the effect that "it is necessary and essential in the public interest to facilitate the prompt peaceful and just settlement of labor disputes between [fol. 77] public utility employers and their employes which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employes, * * *". Section 111.54 provides that, if the collective bargaining process reaches an impasse and stalemate, that a conciliator may be appointed by the Labor Board to assist the parties in the settlement of the dispute. The act, however, "forbids strikes or other activities of both the utility and its employees which would lead to an interruption of essential service to the public and provides for compulsory arbitration of disputes where an impasse in collective bargaining processes has been reached and an interruption of essential service is likely". If the conciliator is unable to effect a settlement, the law provides for the appointment of an arbitrator (or arbitrators), who shall conduct a hearing upon notice to the parties and whose decision, subject to review by the court, shall be binding upon the parties. Sec. 111.56 provides that the status quo shall be maintained pending the determination of the arbitrator. Under Sec. 111.63, the Labor Board is charged with the duty of enforcing compliance with the law and may commence an action in the Circuit Court to restrain violations and to enforce duties imposed thereunder. Sec. 111.62 provides:

> "111.62 Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty. It shall be unlawful for any group of employes of a public utility employer acting [fol. 78] in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential

service; it also shall be unlawful for any public utility employer to lock out his employes when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor."

Plaintiffs contend:

1. That Chap. 414, Laws of 1947, violates the "due process of law" and the "equal protection of the laws" provisions of the XIV Amendment to the Constitution of the United States.

2. That it likewise violates the 13th Amendment in that it imposes "involuntary servitude" upon the plaintiffs.

3. That it impairs the obligations of contract, contrary to Sec. 10, of Article I.

4. That it constitutes an unlawful delegation of legislation, executive and judicial powers, contrary to the constitution of Wisconsin.

5. That it violates Article VII, Section 16, Wisconsin Constitution "in that it establishes a tribunal of conciliation with the power to render binding judgment on the parties without the agreement of both parties."

6. That it is violative of Article XIII, Sec. 9, Wisconsin Constitution, "relating to the way and method of appointment of officers of the state".

[fol. 79] 7. That the law is in conflict with the National Labor Relations Act, as presently amended (known as the Taft-Hartley Act).

8. In case No. 217-441, the further contention is made that the Transport Company is exempted from the operation of the law by the provisions of Sec. 111.51 (1) to the effect that

Subchapter III shall not apply to "railroads nor railroad employes".

It is settled law that "workers are privileged intentionally to cause harm to another by *concerted* action if the *object* and *means* of their concerted action are proper". Restatement: Torts. Sec. 775. The test is whether the *concerted* action is justified. Within the limits stated, workers (1) may organize for lawful purposes, including that of collective bargaining; (2) they may engage in peaceful picketing; (3) they may strike to accomplish lawful ends; and (4) they may contract with an employer as to wages and terms and conditions of employment. All of the rights above enumerated and all of the constitutional guaranties, invoked by counsel for plaintiffs, are subject, however, to regulation under the police power of the state, in the interests of the public welfare. The field of permissible regulation covers all acts and conduct, by employers and employees, which are "affected by a public interest". It cannot be said, therefore, that the right to strike, picket, engage in collective bargaining or to contract with reference to wages and conditions of employment are *absolute* or beyond the power of the state to regulate as the public interests may require. [fol. 80] *Dorcy v. Kansas* 272 U. S. 306, 311, 71 L. ed. 278; *Wolff Co. v. Industrial Court* 262 U. S. 522, 67 L. ed. 1103; *Munn v. Illinois*, 94 U. S. 113, 126, 123, 24 L. ed. 77; *W. L. R. B. v. Fansteel Corp.*, 306 U. S. 240, 256, 83 L. ed. 627; *International Union* v. *Wisconsin E. R. Board*, 250 Wis. 550; 11 Am. Jur. Secs. 267 and 308 (pp. 1092-3). The extent of allowable regulation is measured by the extent of the public interest.

"Police power" is a power inherent in every sovereignty to govern men and things under which the Legislature may, within constitutional limitations, not only prohibit all things hurtful to the comfort, safety, and welfare of society, but prescribe regulations to promote the public health, morals and safety and add to the general public convenience, prosperity and welfare. *State v. Redmon*, 114 N. W. 137, 134 Wis. 89. "The validity of a legislative police regulation depends upon whether the *ends* sought to be attained are appropriate, and the *means* to such ends are also appropriate." *State v. Phelps*, 144 Wis. 1; *State v. Frear*, 144 Wis. 58; *Mehlos v. Milwaukee*, 156 Wis. 591; *Wis. Telephone Co. v. Milwaukee*, 223 Wis. 251; *State v. McKune*, 215 Wis. 592.

What is reasonable regulation in any given case, "being a matter resting in human judgment and difficult of ascertainment, in all doubtful cases judicial authority must defer to legislative wisdom, but, where the interference is plainly excessive, the duty of the court to repeal the encroachment is absolute. *Bonnett v. Vallier*, 116 N. W. 885, 136 Wis. 193." It is well settled that the police power may be exerted [fol. 81] by state legislation, even though the effect may be to invade rights guaranteed by the 14th Amendment, when such legislation bears a real and substantial relation to the public health, safety and welfare. *Louis K. Liggett Co. vs. Buldridge*, 278 U. S. 105, 111-112, 73 L. ed. 204. State legislation will be invalidated only when it is "plain and palpable" that it was no substantial relation to the protection of the public health, safety and general welfare. *Lawton v. Stule*, 152 U. S. 133, 136, 37-8 L. ed. 585; *Thomas Cusack Co. vs. Chicago*, 242 U. S. 526, 531, 61 L. ed. 472. "All that is required to sustain a statutory classification of a reasonable basis on general lines for the division." *Mehlos v. Milwaukee*, 156 Wis. 591.

The courts will presume in favor of the constitutionality of a law, until the contrary clearly appears. *State v. Longlade County*, 193 Wis. 113. The rule is otherwise stated to be that "statutes are to be upheld by the courts unless they are unconstitutional beyond a reasonable doubt. *Appeal of Van Dyke*, 217 Wis. 528. If more than one construction is permissible, that which will sustain the legislation, will be adopted. *In Re Breidenbach*, 214 Wis. 54.

The contention is made that Chapter 414, Laws of 1947, imposes "involuntary servitude" contrary to the XIII Amendment. The Act—Sec. 111.64 Stats. provides:

> "Nothing in this subchapter shall be construed to require any individual employee to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. * * * ".

[fol. 82] Sec. 111.64 is a complete answer to the contention. *France Packing Co. v. Dailey* (C. C. A. 1948), 166 Fed. (2d) 751. *International Union v. Wisconsin E. R. Board*, 250 Wis. 550; *Society of New York Hospital v. Hanson*, 59 N. Y. S. (2d) 91, 97; *Van Riper v. Traffic Tel. Workers Fed.*

of N. J. (decided Sept. 10, 1948), 61 stl. (ad. sheets—Oct. 30, 1948) 570. The same contention as is here made was argued against the constitutionality of the compulsory arbitration law relating to public utilities in the state of New Jersey. The act is similar to the Wisconsin law. The court answered the contention as follows:

> "What preserves the employee's liberty under the constitution is not collective bargaining but is the right of the individual to refuse to work for the Telephone Company."

Continuing, the court held, p. 575:

> "The rights secured by the Constitution are secured to individuals and not to classes. The Union is the collective bargaining agent of 12,000 employees of the Company, under appointment by a majority of the employees in the bargaining unit. In the ordinary course, a committee of the Union agrees with the Company on wages and, I suppose, this agreement is ratified by a majority of the Union members. But in any group so large as this, there must be many who do not want the Union to be their bargaining agent and many others who, while willing to be so represented, are dissatisfied with the stipulated wage scale. The constitutional rights of such individuals are as precious as the rights of the majority. If the argument of the Union were sound, then this minority would be condemned to involuntary servitude when wages were fixed by the collective bargaining process. But I say again, their constitutional right is preserved because they can surrender their employment."

The utility is required by law to give adequate, uninterrupted service. It would not be able to discharge its public functions, if a strike occurs. Incalculable damage would result to the public. The utility and its employees are bound [fol. 83] alike by the provisions of the law. As pointed out in *Wilson v. New*, infra, the foregoing facts are known and accepted by the employee as conditions of his employment.

Tested by the foregoing principles, Chapter 414, Laws of 1947 is well within the permissible limits of legislative discretion, both as to the objective of the regulations and the methods employed for the accomplishment thereof.

The Supreme Court of the United States has recognized as valid the placing of employees of a public utility in a separate class for purposes of regulation. In *Wilson* v. *New*, 243 U. S. 352, 61 L. ed. 755, it was held:

> "(b) *As to the employee.* * * * whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest * * *."

In the briefs of counsel for plaintiff and upon the oral argument, certain hypothetical situations were propounded, in which it was claimed that Chapter 414, especially Sec. 111.62, would operate oppressively. The claimed inequalities will be adjudicated when actual cases arise which require a decision upon the points raised. *Wisconsin Telephone Co. v. Wisconsin E.R.B.* — Wis. — (decided Nov. 16, 1948); *Democrat Printing Co. v. Zimmerman*, 245 Wis. 406. The invalidity of Sec. 111.62, or any part thereof, would not invalidate the Act as a whole.

The provisions of the Act relating to conciliation and arbitration involve no unlawful delegation of judicial power.

[fol. 84] In *State ex rel. Ellis v. Thorne*, 112 Wis. 81, it was held that:

> "Sec. 2, art. VII, of the constitution, vesting all judicial power in matters of law or equity in certain courts, does not prohibit officers other than those holding judicial positions, strictly so called, from acting judicially. It only prohibits them from acting judicially in actions at law or in equity; that is, from doing those things which were done in actions at law or suits in equity, according to the system of jurisprudence which prevailed in this state at the time of the adoption of the constitution."

Also: *State ex rel. Meredith v. Lippels*, 112 Wis. 203; *Forest County v. Langlade County*, 76 Wis. 605; *Local 170 v. Gadola*, (Mich. 1948) 34 N. W. (2d) 71. In the latter case, the provisions of an otherwise similar law was held unconstitutional

on the ground that it attempted to confer *administrative* powers upon a Circuit Judge.

Neither does Chapter 414 involve an unconstitutional delegation of legislative power. The conciliator and arbitrator are purely *administrative* agencies acting under definite standards set forth in Sec. 111.57. *Klein v. Barry*, 182 Wis. 255. See, also, *Wisconsin Telephone Co. v. Wisconsin E.R.B., supra.* The determination is subject to judicial review. Sec. 111.60.

Similar power to administrative agencies, such as the Industrial Commission, Tax Commission, Boards of Assessment etc., have long been upheld by the Supreme Court. *Borgnis v. Falk Co.*, 147 Wis. 327; *Town of Holland v. Village of Cedar Grove*, 230 Wis. 177; *Greenbush v. Plymouth*, 230 Wis. 210.

Section 16, Art. VII, Wisconsin Constitution, which provides for "the regulation of tribunals of conciliation to be established in and for any township" with power to render [fol. 85] judgment to be obligatory upon the parties when they *voluntarily* submit their matters in difference to arbitration and agree to abide the judgment or assent thereto in writing,—is not applicable. The section is contained in Article VII which deals with the "Judiciary", and refers to controversies which are justic-able in actions at law or equity, cognizable by courts—not to an act of an administrative agency. *Wis. Tel. Co. v. Wis. E.R.B.*, supra. The settlement of a labor dispute was not in the minds of the framers of the constitution. Moreover, there is nothing in the section which precludes legislative action under the police power of the state, at least until the legislature has acted under the mandate of Section 16. Further, the section deals only with controversies in which the parties *voluntarily* submit the matters in difference and agree to be bound by the "judgment".

The contentions that the Act constitutes an invasion of executive power and of Sec. 9, Art. XIII are without substance.

The argument is advanced that the National Relations Board has assumed jurisdiction of the employment relations between the Transport Company and its employees and that the right to strike is conferred by the Federal Labor-Management Relations Act, 1947, and which, it is contended, supersedes the denial of the right in Chapter 414. The answer of the Transport Company *admitted* by

plaintiffs' demurrer (in the last above entitled action), alleges that in December, 1947, the National Board, pursuant to a written stipulation of the parties, conducted an "all-union" referendum and that the National Board did [fol. 86] not thereby assume *or exercise* general jurisdiction over said employees and, further, that the alleged "controversy" which resulted in the holding of said referendum ceased and terminated long before the commencement of this action. Further, that the National Board has not assumed jurisdiction over the present controversy.

The allegations of the amended complaint in the Gas Company case merely allege that the defendant company is engaged in Interstate Commerce and is therefore subject to the National Act.

Section 13 of the Taft-Hartley Law, 29 U.S.C.A. Par. 163, states:

> "Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike *or to affect the limitations or qualifications on that right.*" (Emphasis added.)

There is no conflict between Chapter 414 and the Taft-Hartley Act. The Wisconsin Act covers a field not included in the Federal Act. Its right to enact the regulations in the exercise of its police power is expressly recognized by Section 13, above quoted.

The Wisconsin Supreme Court has uniformly held that until and unless the National Labor Relations Board takes jurisdiction over a particular controversy, Congress intended to leave within the reserved power of the state the right to deal with such controversies. Unless these rulings of the state supreme court are reversed they represent the law of this state: *Wisconsin E. R. Board v. Algoma P. & V. Co.*, 252 Wis. 549, 32 N. W. 2d 417; *Allen-*[fol. 87] *Bradley Local 1111 v. Wisconsin E. R. Board* (1941) 237 Wis. 164, 295 N. W. 791; *Christoffel v. Wisconsin E. R. Board*, (1943) 243 Wis. 332, 10 N. W. 2d 197; *International Union, etc. vs. Wisconsin E. R. Board* (1944) 245 Wis. 417, 14 N. W. 2d 872.

The objectives of the Federal and State Acts are the same—namely, to substitute peaceful processes for force in the settlement of labor disputes. Collective bargaining

is likewise encouraged by the Wisconsin Act. Secs. 111.52, 111.53, 111.64.

The final contention is that the Transport Company and its employees (in the second action) are excluded by Sec. 115.51 (1) from the provisions of the Act. Sec. 115.51 (1) provides that a public utility employer shall include one "furnishing * * * public passenger transportation." It concludes with the statement that "this subchapter does not apply to railroads nor railroad employes."

Sec. 370.01 (1) provides that "all words and phrases shall be construed according to the *common* and approved usage of the language; * * *".

Webster defines a railroad as "a permanent road or way having a line of rails fixed to ties * * * providing a track for freight cars, passenger cars or coaches and other rolling stock designed to be drawn by locomotives or sometimes propelled by self-contained motors * * *". While on the other hand "the lighter electric street-car lines and the like are usually termed *railways*. In determining the meaning of "railroad" as used in the Act, it should "receive a [fols. 88-90] construction that will effectuate its purpose." *Cawker v. Meyer*, 147 Wis. 320, 326. "Public passenger transportation" is ordinarily by street railways. It is a matter of common knowledge that passenger transportation is carried on by street cars, gas buses and trackless trolleys. It would be absurd to say that the legislature intended to exclude street car transportation and to include only buses and trackless trolleys. To exclude street railways would emasculate the statute as to passenger transportation.

Further, Chapter 193 Stats. deals with *street railways* and Chapters 190-192 with ordinary steam *railroads*.

It is clear that the legislature had in mind the distinction between "railroads" and "street railways" in the enactment of Chapter 414. Further, the ordinary steam railroad is governed by the provisions of the Federal Railway Labor Act.

In *Local 170, Transport Workers v. Gadola* (Mich.) 34 N. W. (2d) 71, a Public Utilities Compulsory Arbitration Act was held unconstitutional on grounds not here involved. The case, however, contains data in point on the case at bar. Included in the opinion is a list of states which have recently enacted similar laws. In *Van Riper v. Traffic Tele-*

phone Workers, supra, the various contentions here made with respect to claimed violations of the Federal Constitution are considered.

For the reasons stated, the demurrer of the defendant in the action first above entitled will be sustained and the demurrer of plaintiffs in the second action will be overruled. Judgments may be entered declaring the rights and status of the parties in accordance with the foregoing.

Copies to: Max Raskin, Padway, Goldberg & Previant, Beatrice Lampert, Asst. Atty. Gen., Shaw, Muskat & Paulsen, Miller, Mack & Fairchild.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 91] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

ARTHUR ST. JOHN, et al., Plaintiffs,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, et al., Defendants

OPINION—Filed April 28, 1950

Plaintiffs bring this action individually and as officers of Local 18, United Gas, Coke and Chemical Workers (CIO) (hereinafter called the "union"), upon behalf of all the union members who are employees of the corporate defendant. Plaintiffs seek a permanent injunction enjoining and restraining the enforcement of subchapter 3 of Chap. 111, Wis. Stats. of 1947,[1] sometimes referred to as the Public Utility Anti-Strike Law.[2]

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[1] The Wis. Stats. designate this section as subchapter III of Chap. 111. To avoid confusion we shall refer to this section as subchapter 3 of Chap. 111.

[2] Subchapter 3 of Chap. 111 contains a legislative declaration of policy that "the interruption of public utility service results in damage and injury to the public wholly apart from

[fol. 92] They also seek a declaratory judgment that said subchapter of the statutes is invalid. Defendants Gooding, Fitzgibbons and Rule are the individual commissioners comprising the Wisconsin Employment Relations Board. Defendant Fairchild is the Attorney General for the State of Wisconsin. The corporate defendant (hereinafter called the "company") is a public utility under Wisconsin law, and is the employer of approximately 770 men who are members of the union. The company's utility service is rendered in an area entirely within the State of Wisconsin; however it purchases a substantial portion of its supplies and materials outside the State, and it furnishes gas to manufacturing concerns that produce goods for interstate commerce.

Commencing in June, 1937, and annually thereafter including June, 1948, the union and the company entered into collective bargaining agreements. On August 1, 1943, the union was certified by the National Labor Relations Board as the exclusive bargaining representative for the employees of the company. The most recent contract expired on June 1, 1949.

In September, 1949, the union filed a petition with the National Labor Relations Board, charging that the company was guilty of an unfair labor practice by refusing to bargain with the union. The National Labor Relations Board did not take any action on this complaint. Thereafter the union and the company did engage in collective bargaining cover-

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the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare." It also imposes upon employers and employees the duty of reaching agreements on wages and working conditions through collective bargaining. It authorizes the Wisconsin Employment Relations Board to appoint a conciliator when the bargaining process reaches a stalemate (Sec. 111.54) and, where interruption of essential service is likely, authorizes the Wisconsin Employment Relations Board to appoint arbitrators (Sec. 111.55). The award of the arbitrators, subject to judicial review is final and endures for one year (Secs. 111.59 and 111.60). Strikes are forbidden and are made a misdemeanor (Sec. 111.62). The Wisconsin Employment Relations Board is made responsible for the enforcement of the subchapter and is authorized to compel compliance by commencing an action in a circuit court.

ing wages, pensions and other conditions of employment, but no agreement was reached. The Wisconsin Employment Relations Board then appointed a conciliator whose efforts to bring the union and the company into agreement were unsuccessful. On October 3, 1949, the Wisconsin Employment Relations Board issued an order listing five names as a panel of arbitrators, and ordering the union and the company each to strike one name therefrom, pursuant to provisions of Sec. 111.55, Wis. Stats. The remaining three were to act as arbitrators. On October 4, 1949, the plaintiffs and other employees, acting in concert and agreement, left their employment and started picketing the premises of the company.

[fol. 93] On October 6, 1949, the union and the company agreed upon wages, hours, and other conditions of employment but did not agree upon the terms and conditions of the pension plan. The Wisconsin Employment Relations Board and the Attorney General, so the complaint herein alleges, threatened to compel the plaintiffs to submit the unresolved issues of pensions to arbitrators.

On October 13, 1949, in an action commenced in the Circuit Court of Milwaukee County, wherein the Wisconsin Employment Relations Board was plaintiff, the plaintiffs herein were enjoined from calling a strike, or going out on strike, or causing an interruption in the service of the company. It was further ordered that certain of the officers of the union notify all employees who had been called out on strike to resume their employment. This order was issued pursuant to subchapter 3 of Chap. 111. The Attorney General and the Wisconsin Employment Relations Board thereafter caused process to issue looking to the punishment of the plaintiffs and other employees for violating said injunction. The Attorney General likewise threatened to invoke criminal penalties.

In the case at bar, after putting in issue various allegations of the complaint, the defendants pleaded that prior to the commencement of the case at bar plaintiffs chose as their forum for the litigation of the same issues the Circuit Court of Milwaukee County, in which action, on demurrer, the court entered judgment that subchapter 3 of Chap. 111, Wis. Stats. of 1947, was constitutional and valid. Defendants plead such State court action as res judicata.

We proceed to a consideration of the defense of res judicata. The judgment of the Circuit Court of Milwaukee County, which is pleaded as a bar, provided in part as follows:

> "It Is Hereby Adjudged and Determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions [fol. 94] of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947, and does not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, . . . any rights, privileges or protection secured to them under either of said Constitutions or said act of Congress: and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947."

An appeal from this judgment was taken by the plaintiffs in that case to the Supreme Court of Wisconsin, which court affirmed the Circuit Court judgment. Plaintiffs did not appeal to the United States Supreme Court or seek other relief from the action of the Wisconsin Supreme Court. Since the time for appeal to the United States Supreme Court has long since elapsed, the judgment of the Circuit Court, affirmed by the Wisconsin Supreme Court, is conclusive. *Angel* v. *Bullington*, 330 U.S. 183, 189. See also: *Grubb* v. *Public Utilities Commission of Ohio*, 281 U.S. 470, 475; *Mitchell* v. *First National Bank of Chicago*, 180 U.S. 471, 480.

The judgment of the Circuit Court of Milwaukee County, affirmed by the Wisconsin Supreme Court, is res judicata, and bars a subsequent action in this court, if it falls within the rule that a judgment of a State court of competent jurisdiction is binding and conclusive as to all matters put in issue and decided in the State court, and bars a subsequent action in a federal court if the causes of action,

subject matter and parties are the same. *Angel* v. *Bullington*, supra, pp. 192-193; *Treinies* v. *Sunshine Mining Co., et al.*, 308 U.S. 66, 75-78. Indeed such a judgment is binding as to all relevant issues which could have been raised and litigated therein. *Heiser* v. *Woodruff, et al.*, 327 U.S. 726, 735; *Troxell, Administratrix* v. *Delaware, Lackawanna & Western Railroad Co.*, 227 U.S. 434, 440; *Reinkey* v. *Wilkins*, 172 Wis. 515, 520.

[fol. 95] We think it clear that the causes of action and the subject matter are the same in the two suits. The cause of action in the case at bar is based upon the same facts as in the State court action. This is so even though some of the actions which could only be considered in a prospective way by the State court have since come to pass. The fact that a strike was actually called since the State court judgment was rendered does not create a different situation. The allegations in the pleadings in the two cases are substantially the same. The facts necessary to sustain the two actions are the same. As for the subject matter, the issues in the case at bar and in the State court action arose from the claimed repugnancy of subchapter 3 of Chap. 111, Wis. Stats., to the federal Constitution and to the Labor-Management Relations Act of 1947, and those issues were decided against the union in the State court action. The questions essential to a determination herein are the same as those of the State court case.

It is true that the opinion of the Wisconsin Supreme Court contains some equivocal language which furnishes some foundation for the contention of plaintiffs herein that all of the issues were not squarely met. Nevertheless it is the action which the Supreme Court took which is important rather than any reasons which it might give for such action. The appeal was from the judgment of the Circuit Court. Included in the issues squarely raised were the claimed repugnancy of subchapter 3 of Chap. 111 to the federal Constitution and to the Labor-Management Relations Act of 1947. The Wisconsin Supreme Court was empowered to reverse, affirm or modify the Circuit Court judgment; it did not reverse or modify, but affirmed the judgment without any condition or qualification. The mandate of the Wisconsin Supreme Court did not affirm an order sustaining a demurrer, but rather it affirmed the judgment of the Circuit Court of Milwaukee County in that case. Moreover, it is not important whether we refer to the

judgment which was affirmed as a judgment of the Circuit Court or of the Supreme Court.

Plaintiffs' argument that all of the merits of the con- [fol. 96] troversy were not passed upon is conclusively answered in *Angel* v. *Billington, supra*, where the controlling opinion holds (p. 190):

> "It is suggested that the North Carolina Supreme Court did not adjudicate the 'merits' of the controversy. It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the States. . . .
>
> "The 'merits' of a claim are disposed of when it is refused enforcement. If an asserted federal claim is denied enforcement on a professed local ground, but a so-called local ground which is subject to review here because it is in fact the adjudication of a federal question, then the 'merits' of that claim were adjudicated in the only sense that adjudication of the 'merits' is relevant to the principles of *res judicata*. . . ."

As the State court litigation, in both the Circuit Court and Supreme Court, involved questions and issues identical to those present and raised in the instant action, and the plaintiffs not having appealed to the United States Supreme Court, it follows that, if the parties to each of the actions are the same, plaintiffs herein are precluded from further litigating the questions and issues in this action under the doctrine of res judicata.

We now focus our attention on the question whether the parties to the State court action were the same as the parties in the case at bar. Manifestly they are not identical. Certain individuals are named in the pleadings in the case at bar, both as plaintiffs and defendants, who were not thus named in the State court action. The union and Thomas Lansing, its then president, were plaintiffs in the State court action and they are also plaintiffs in the case at bar. The parties plaintiff are not changed because the amended complaint herein now names Arthur St. John,

the current president of the union, and lists other officers of the union and members of its bargaining committee. Plaintiffs in both cases are the union and the officers thereof who represent the membership. We hold that the parties [fol. 97] plaintiff are the same in both actions.

The Wisconsin Employment Relations Board and the Milwaukee Gas Light Company were named defendants in both actions. In addition, the three individuals who are the Wisconsin Employment Relations Board are named individually in the case at bar, as well as Thomas E. Fairchild, the Attorney General of the State of Wisconsin. However, the three members of the board are sued in the present action only as members of the board, and not in their capacity as private citizens. The Attorney General is sued only in his official capacity, that of attorney representing the Wisconsin Employment Relations Board. We hold that the parties defendant are the same in both actions.

The fact that the union seeks an injunction in the case at bar in addition to the declaratory judgment sought in both cases does not prevent the judgment in the State court action from operating as an estoppel in this court. 50 C.J.S., Judgments, Sec. 900 (a). A change in the form or measure of the relief asked in the complaint in a second cause of action does not preclude the application of the doctrine of res judicata. 30 Am. Juris., Judgments, Sec. 176.

A valid distinction cannot be drawn between a judgment entered in a State court action sustaining a demurrer to a complaint and a judgment rendered after a trial upon the merits. In *Northern Pacific Railway Co. v. Slaght*, 205 U. S. 122, 130, the court stated:

> ". . . It is well established that a judgment on demurrer is as conclusive as one rendered upon proof."

In *Ellis v. Northern Pacific Railroad Co.*, 80 Wis. 459, 465, the court said:

> ". . . It is sufficient to say that by repeated decisions it has become the settled law in this State that the decision of this court upon a demurrer is conclusive upon the questions legitimately involved and is res adjudicata in that case. . . ."

In *Lewko v. Chas. A. Krause Milling Co.*, 219 Wis. 6, 8, the court said:

> "The plaintiff first argues that a decision sustaining a demurrer is not res judicata because there has been no trial upon the merits. In this contention it is considered that the plaintiff is in error. . . ."

[fol. 98] It follows that each member of the union upon whose behalf the State court action was brought is bound by the judgment that was entered in that action. This court has no discretion to pass upon the merits of the important questions raised in the case at bar, and *ignore* the defense of res judicata. In 30 Am. Juris., Judgments, Sec. 254, it is said, at p. 983:

> ". . . Where the prior judgment is properly brought to the attention of the court, the question whether the doctrine of res judicata should be applied is one of law, and not for the discretion of the court."

The full faith and credit clause of the United States Constitution (Art. IV, Sec. 1) applies to federal courts. 28 U.S.C. 7138. Federal courts are required to give full faith and credit to the judgments of State courts. *Davis v. Davis*, 305 U. S. 32, 39-40.

The defendants' defense of res judicata must be sustained. Formal findings of fact and conclusions of law, together with formal judgment, will be prepared by counsel for defendants and submitted to counsel for plaintiffs for approval as to form, and if so approved then to the court for signatures and entry; but if not approved, then, upon notice, to the court for settlement, signatures and entry.

Dated at Milwaukee, Wisconsin, this 28th day of April, A. D. 1950.

(Sgd.) F. Ryan Duffy, U. S. Circuit Judge. (Sgd.) Patrick T. Stone, U. S. District Judge. —— ——, U. S. District Judge.

[fol. 99] DISSENTING OPINION OF HONORABLE ROBERT E. TEHAN, UNITED STATES DISTRICT JUDGE

The majority opinion states the facts which brought this action to this court and concludes that the plaintiffs have already had a complete adjudication in the State courts of all of the issues they raise here and thus are now barred from litigating these issues by the doctrine of res judicata. Our dissent is prompted by the belief that the issues raised in this action were not finally adjudicated in the State action and that plaintiffs are entitled to an adjudication of these issues.

In the complaint which plaintiffs filed in the Circuit Court of Milwaukee County, Wisconsin, plaintiffs alleged that subchapter 3 of Chap. 111, Wis. Stats., 1947 was void in that it was in conflict with the Wisconsin Constitution, the Federal Constitution and the Labor Management Relations Act.

The judgment of the Circuit Court adjudicated each of the issues raised in the plaintiffs' complaint in that action. This judgment was then appealed to the Supreme Court of the State of Wisconsin, and that court issued an opinion and affirmed the judgment of the Circuit Court.[3] The majority opinion herein holds that the Circuit Court judgment, affirmed by the Wisconsin Supreme Court, is conclusive to bar plaintiffs in this action.

I question first the assertion that the judgment of the Circuit Court of Milwaukee County is a bar in this action. When a party appeals from a judgment of a Circuit Court of Wisconsin to the Wisconsin Supreme Court, and the Circuit Court's judgment is affirmed, is the judgment which then determines the rights of the parties to that action the [fol. 100] judgment of the Circuit Court? The Wisconsin Supreme Court has said that it is not.

In the case of *Ean v. The Chicago, Milwaukee & St. Paul R. Co.*, 101 Wis. 166, the Supreme Court considered the effect of its affirmance of a Circuit Court judgment. In that instance, the Supreme Court had affirmed a judgment of an action commenced in the superior court of Milwaukee County. After the appeal was determined, the cause was remanded. Then, within one year of the date of the entry of the judgment in the superior court, that court entered

[3] *United G., C. & C. Workers v. Wis. E. R. Board*, 255 Wis. 154, 38 N. W. (2d) 692.

an order vacating its judgment and permitted the plaintiff to plead further. The order purported to be made under the provisions of R. S. 1878, sec. 2832. The provisions of this section, according to the Supreme Court opinion, were "substantially to the effect that the court or judge may, in discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment against him 'through his mistake, inadvertence, surprise or excusable neglect'." The court held that the section applied only to judgments of the Circuit Court and "not to those which by operation of law have become judgments of this court." The court clearly held that when a mandate is remanded and the lower court enters a final judgment in accordance therewith, "the judgment so entered is, in legal effect, the judgment of this court. It is none the less true in cases where there is an affirmance than when some other directions are given." In other words, the court noted that after an appeal, the judgment in any case is the judgment of the Supreme Court and that the legal consequences of that judgment are not necessarily identical as those which attach to the lower court judgment. To the same effect see *Crowns v. Forest Land Co.*, 100 Wis., 554 and *Hoan v. Journal Co.*, 241 Wis. 483. Thus we see that when a judgment of the Circuit Court is considered by the Supreme Court and the Supreme Court renders an opinion as to the propriety of that judgment, the Supreme Court has, in legal effect, issued a new judgment which becomes the judgment of that case. Therefore, it is only the judgment of the Supreme Court which can be pleaded in bar under the doctrine of res judicata.

[fol. 101] The full faith and credit clause of the United States Constitution requires that in any particular instance a Federal Court must give to a judgment of a State Court the same legal effect as the courts of that state would give to it. *Covington v. First National Bank*, 198 U. S. 100; *Jarrard v. Southeastern Shipbuilding Corporation*, 163 F. (2d) 960. In the instant case, we must consider the judgment which is pleaded in bar in the light in which it should be considered by a Circuit Court of Wisconsin had the plaintiffs commenced this action in such a court. We think that in striving to determine what legal effect the courts of Wisconsin would give to the judgment now pleaded in bar, it is proper that we look to the opinion which the Supreme

Court rendered at the time it handed down its judgment in that case. In so doing we recognize that there is a distinction between a judgment or findings of fact and on opinion. 49 C. J. S. sec. 4. But we believe that since an opinion explains the basis in law upon which the judgment is rendered, it is a proper guide in determining what the legal effect of that judgment should be. It is proper for a Federal Court to examine the opinion of a State Court to see what issues were determined. *San Jose Land and Water Co. v. San Jose Ranch Co.*, 189 U. S. 177; *Gross v. United States Mortgage Co.*, 108 U. S. 477; *Carson v. Three States Lumber Co.*, 142 F. 893, affirmed 149 F. 377

The majority opinion herein dismisses the Supreme Court opinion with the observation that it contains "some equivocal language which furnishes some foundation for the contention of plaintiffs herein that all of the issues were not squarely met." They pass over language which seems to us clearly to indicate that the Supreme Court felt it should not pass on certain constitutional questions until a factual situation was presented to the Court at a later date. The majority opinion places complete reliance on the words "Judgment Affirmed", which appear at the end of the opinion.

If the Supreme Court had merely affirmed without opinion there would be no dissent, and if the Supreme Court's opinion had discussed only one of the constitutional questions [fol. 102] and remained silent on the other questions raised by plaintiffs, we would have reluctantly concurred.

The clear language of the Supreme Court's opinion on its position on certain constitutional questions requires, in my mind, the same consideration and treatment that was given by a distinguished court in the case of *Moran Towing and Transportation Co., Inc. v. Navigazione Libera Triestina, S.A.*, 92 F. (2d) 37. We think the Second Circuit Court of Appeals was there confronted with the same problem we face here. The Moran Companyhad furnished tugboat service and a tug master as a pilot for the N.L.T. under a contract which provided:

> "'When the captain of any tug engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or any other li-

censed pilot becomes a servant of the owner in respect to the giving of orders to any of the tugs engaged in the assisting service and in respect to the handling of said vessel and neither the tugs or their owners or agents shall be liable for any damage resulting therefrom.' "

During the maneuvering of the vessel, property of The Robins Company was damaged and it sued Moran and N. L. T. in the New York State Courts for damages. The trial court found negligence on the part of the pilot, directed judgment for The Robins Company against Moran, and dismissed the complaint against N.L.T. The trial judge filed an opinion which was made part of the judgment roll in the State Court in which he indicated that he adjudged that Moran could not divest itself of liability to a third person by means of such a contractual provision and also that the contractual provision would not relieve Moran even as to N.L.T. because the tug master who performed the pilot duties was not a licensed pilot such as the clause called for.

An appeal was taken from this judgment to the New York Appellate Division which affirmed the judgment without opinion. Then an appeal was taken to the Court of Appeals which also affirmed the judgment and issued an [fol. 103] opinion. Thereafter, Moran paid the judgment and brought action in Federal Court against N.L.T. to recover the amount of the judgment and its disbursements, claiming that N.L.T. was an indemnitor under the terms of the "pilotage clause". The trial court dismissed the libel on the ground that the issue of liability for the acts of the pilot had been determined by the State Court and could not again be litigated. This judgment was appealed to the Circuit Court of Appeals, and it is the opinion of this court, composed of Circuit Judges Learned Hand, Augustus N. Hand and Harrie B. Chase (the opinion was written by Augustus Hand) which we cite in support of our position. The court looked to the language of the State Court opinions to determine what it was that the trial court and then the Court of Appeals had decided. It concluded that while the Court of Appeals had affirmed the judgment of the trial court, the language which the Court of Appeals used in its opinion indicated that it did not agree with the total adjudication of the trial court. This conclusion was based upon the assumption that it was proper to look to the opinion of the State Courts to determine what was there

decided. The propriety of this assumption was discussed by the court.

> "The appellee, however, cites Russell v. Russell, 134 F. 840 (C.C.A. 3), and Oglesby v. Attrill, 20 F. 570 (Wallace, J., in U.S. Circuit Court), as holding that an unconditional affirmance of a judgment by an appellate court, though rendered on entirely different grounds or only on some of the grounds upon which the decision of the lower court was rendered, leaves the questions determined by the lower court as res judicata in all respects. To treat as controlling the findings of a trial court when the appellate court upsets or disregards them and renders a decision of affirmance on different grounds furnishes parties to other litigations affected by the decision a false guide. There seems to be a paucity of authority on this questions, and with all due respect we cannot subscribe to such a formal treatment of the situation. * * *"

We, too, feel it is not proper to deprive parties of substantial rights by "a formal treatment of the situation".

In the Moran case the Circuit Court of Appeals did not hesitate to look to the opinion of the State Appellate Court to determine that the judgment of the appellate court was [fol. 104] different than that of the State trial court. So in the instant case we look to the opinion of the Wisconsin Supreme Court which, to us, indicates clearly that its judgment was different than that rendered by the circuit court.

Let us now examine the opinion of the Wisconsin Supreme Court in this case in the light of the Moran case. The plaintiff public utility employees and their union claimed they were aggrieved by an act of the Wisconsin legislature and commenced an action for declaratory relief, alleging that the act of the legislature was violative of their rights under the Constitutions of the United States and State of Wisconsin and repugnant to the Labor Management Act of 1947. The defendants demurred and the circuit court sustained the demurrer and entered judgment finding against plaintiffs on each of these grounds. The matter was appealed to the Wisconsin Supreme Court and that court, after reciting the facts, began its opinion with the following language:

> "We are first confronted with a fundamental rule of law that the constitutionality of a statute is not to be

determined as a hypothetical question or upon assumed facts or unreal possibilities. The court should not anticipate a question of constitutional law before it is to be applied to the precise facts before it and should not attempt to test the operation of a law under every conceivable set of circumstances. This rule is illustrated by the following quotations from prior decisions of this court:

" 'Sound judicial policy precludes the court from considering the question of the constitutionality of a legislative act unless a decision respecting its validity is essential to the determination of some controversy calling for judicial solution.' *State ex rel. Rosenheim v. Frear*, 138 Wis. 173, 176, 119 N. W. 894.

" 'The legislature, subject to the constitutions of the United States and of this state, is supreme in its particular field, and this court will not declare laws unconstitutional unless it clearly appears beyond reasonable doubt that they contravene constitutional provisions. See *Payne v. Racine*, 217 Wis. 550, 259 N. W. 437; *Petition of Breidenbach*, 214 Wis. 54, 252 N. W. 366; *Doering v. Swoboda*, 214 Wis. 481, 253 N. W. 657; *State ex rel. Carnation M.P. Co. v. Emery*, 178 Wis. 147, 189 N. W. 564, and the numerous earlier decisions cited therein.' *State ex rel. Atty. Gen. v. Wisconsin Constructors*, 222 Wis. 279, 284, 268 N. W. 238.

[fol. 105] " 'A constitutional question will not be decided until it is brought directly in issue by the facts involved in the instant case.' *Democrat Printing Co. v. Zimmerman*, 245 Wis. 406, 411, 14 N. W. (2d) 428.

"Therefore, upon this record, we can only determine whether or not ch. 414, Laws of 1947, is a valid and constitutional enactment. The plaintiffs contend that it is not because it contains unlawful delegations of legislative and judicial powers. * * *"

The court's opinion proceeds to a discussion of the questions of delegation of legislative and judicial powers (neither of which issues is involved in these proceedings), decides the issue of delegation of legislative powers, and continues with the following language:

"Upon the record here there is no question of the delegation of judicial power. This question and other

contentions and arguments of the plaintiffs can be disposed of best when a case involving a particular question is presented and fully argued. If any person or agency, in the enforcement of the law, should attempt to usurp unlawful legislative or judicial powers there is an adequate remedy."

The Wisconsin Court's opinion in effect says: We will not decide the principal constitutional objections raised by the plaintiffs. We will only decide the question of whether the statute in question involves an unlawful delegation. The door, however, is not closed on your grievances. At a more propitious time and place, when a matured fact situation has developed, you will have your day in court.

Abbreviating the court's own language, it said:

"The court should not anticipate a question of constitutional law before it is to be applied to the precise facts before it and should not attempt to test the operation of a law under every conceivable set of circumstances. * * * Therefore, upon this record, we can only determine whether or not (the statute) is a valid and constitutional enactment. * * * This question (delegation of judicial power) and other contentions and arguments of the plaintiffs can be disposed of best when a case involving a particular question is presented and fully argued. * * *"

Such language would never have been used by a court which did not conclude that a final disposition of the issues again raised in these proceedings was open to a future de-
[fol. 106] termination such as sought here.

We must also remember that the action in the State court was one for declaratory judgment. A judgment resulting from a declaratory judgment action is not res judicata to issues which were not actually determined. *Restatement of Judgments*, Sec. 77, Comment b. states:

"*Effect of declaratory judgment on subsequent controversies.* The effect of a declaratory judgment in subsequent controversies between the parties depends upon the scope of the declaration of rights made by the judgment. As to matters declared by the judgment, the parties are precluded from relitigating them; as to

matters not declared by the judgment, although a declaration might have been made as to them, the parties are not so precluded.

"Where a plaintiff seeks a declaratory judgment, he is not seeking to enforce a claim against the defendant. He is seeking rather a judicial declaration as to the existence and effect of a relation between him and the defendant. The effect of the judgment, therefore, unlike a judgment for the payment of money, is not to merge a cause of action in the judgment or to bar it. The effect of a declaratory judgment is rather to make res judicata the matters declared by the judgment, thus precluding the parties to the litigation from relitigating these matters."

The majority opinion places great reliance on the case of *Angel v. Bullington*, 330 U. S. 183. I feel that the Angel case is clearly distinguishable from the case at bar. The majority opinion in the Angel case held that the North Carolina Supreme Court adjudicated all of the federal issues involved when it ruled that it had no jurisdiction to consider the claim of Bullington. In other words, when the North Carolina Court ruled that a state statute removed from North Carolina courts jurisdiction to consider Bullington's claim, there was implicit in that ruling the determination that the state statute was constitutional. I think it is impossible to find in the Wisconsin Supreme Court's statement, that certain issues are not before it because a proper factual situation has not developed, any implicit ruling that the Wisconsin statute is not in conflict with the Federal Constitution or the Labor Management Relations Act.

[fol. 107] Another clear basis of distinction rests in the fact that the action before the Wisconsin State court, unlike the Angel case, was one seeking a declaratory judgment, and that a declaratory judgment, as noted in *Restatement of Judgments*, sec. 77, is conclusive only as to matters actually determined and not as to those which might have been determined.

The plaintiffs in the instant case went first to the Wisconsin courts to obtain a ruling on the validity of the Wisconsin statute. The Wisconsin Supreme Court, in my opinion, denied them a complete ruling at that time, but held open the door of the court for their return at some later date when the factual situation warranted such a return. Following

this a strike occurred and the challenged statute was put into operation. Plaintiffs then came to this court and asked for a ruling on the validity of the statute. This we have denied them by the application of res adjudicata. The doctrine of res adjudicata is a wholesome one, but I do not believe it was ever intended to work such a result.

The decision of this court has not only refused them that ruling, but by holding that the Wisconsin decision was res judicata on all the issues raised here, are we not then closing the door to the Wisconsin courts that the Supreme Court of the state held open? There seems substantial authority for the proposition that this court's ruling on the question of res judicata, if it becomes final, will, in turn, be res judicata on that issue and thus bar the plaintiffs from ever returning to the Wisconsin court. *Freeman on Judgments*, 5th Ed., p. 1498.

Dated, Milwaukee, Wisconsin, this 28th day of April, A. D. 1950.

(S.) Robert E. Tehan, U. S. District Judge.

[fol. 108] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN

Civil Action No. 4844

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed June 14, 1950

The above entitled action having come on for trial before the United States District Court for the Eastern District of Wisconsin, on November 28th, 1949, the Honorable F. Ryan Duffy, Patrick Stone and Robert E. Tehan, Judges presiding, and the plaintiffs appearing by Max Raskin and Wm. F. Quick, their attorneys and the defendants, Wisconsin Employment Relations Board and L. E. Gooding, J. E. Fitzgibbon, and Henry C. Rule appearing by their attorney, Thomas E. Fairchild, and the defendant Milwaukee Gas Light Company appearing by Miller, Mack & Fairchild, by Gilbert Hardgrove, their attorneys, and the defendant

Thomas E. Fairchild appearing in proper person, and a [fol. 109] Second Stipulation of Facts having been filed and the court having heard the arguments and received briefs of all parties, and being fully advised in the premises, does hereby make the following findings of fact and conclusions of law.

Findings of Fact

1. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00) pursuant to Section 1331, of Title 28 of the U.S.C.A.

2. That the plaintiff, Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and hereinafter referred to as the union, is an unincorporated association of employees employed in the production, maintenance, operation, construction and meter reading, of approximately seven hundred seventy (770) in number, all of whom are employed with the defendant, Milwaukee Gas Light Company, and that the office of the said union is in the city of Milwaukee, Milwaukee County, Wisconsin; that it is a labor organization as defined in Section 2-(5) of the Labor Management Relations Act of 1947.

3. That the plaintiff, Chester Walczak, is a citizen of the United States, and a resident of the city and county of Milwaukee, Wisconsin, and is the International Representative of said union.

4. That the plaintiff, Arthur St. John, is a citizen of the United States, and a resident of Waukesha County, Wisconsin, and is the president of the said union. That he is an employee of the Milwaukee Gas Light Company.

5. That the plaintiff, Al Fuhrman, is a citizen of the United States, and a resident of Milwaukee County, Wisconsin, and is the vice president of the said union. That he is an employee of the Milwaukee Gas Light Company.

6. That the plaintiff, Emil Heimsch, is a citizen of the [fol. 110] United States, and a resident of Milwaukee, Wisconsin, and is the Chairman of the Bargaining Committee of the union. That he is an employee of the Milwaukee Gas Light Company.

7. That the plaintiff, Thomas Lansing, is a citizen of the United States, and a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

8. That the plaintiff, John F. Sheehan, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

9. That the plaintiff, E. F. Regner, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

10. That the plaintiff, Edward P. Regan, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

11. That the plaintiff, La Moine S. Cardinal, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

12. That the plaintiff, Gordon Donnelly, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is the recording secretary of said union. That he is an employee of the Milwaukee Gas Light Company.

13. That the defendant, L. E. Gooding, is a Commissioner of the Wisconsin Employment Relations Board, and duly [fol. 111] appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city of Fond du Lac, Fond du Lac County, Wisconsin. The defendant, J. E. Fitzgibbon, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city of Milwaukee, Milwaukee County, Wisconsin. The defendant, Henry C. Rule, is a Commissioner of the Wiscon-

sin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and resident of the city of Eau Claire, Eau Claire County, Wisconsin. That all of said defendants constitute the Wisconsin Employment Relations Board, which has offices at 110 East Wisconsin Avenue, Milwaukee, Wisconsin. That said Wisconsin Employment Relations Board is established pursuant to and under the Statutes of the state of Wisconsin, 111.03, Wis. Stats. of 1947, and is composed of the aforesaid commissioners; that said Board has for its duty the enforcement and compliance with sub-chapter 3 of chapter 111 of the Laws of the State of Wisconsin titled "Public Utilities" as set forth in sections 111.50 through 111.64 Wisconsin Statutes of 1947.

14. That the defendant, Thomas E. Fairchild, is the duly elected, qualified, and acting Attorney General of the State of Wisconsin, and as such is charged with the enforcement of the laws of the State of Wisconsin, is a citizen of the United States and is a resident of the Village of Verona, Dane County, Wisconsin.

15. That the members of the union, including the plaintiffs, have assembled and associated themselves in the said union for the purpose of collective bargaining and otherwise dealing with the defendant company concerning hours of employment, rates of pay, pensions, working conditions, grievances arising out of employment, and for other mutual [fol. 112] aid and protection, and by such means to improve their economic and social conditions as citizens of the United States.

16. The Labor Management Relations Act of 1947, adopted by the Congress, is a law regulating commerce as set forth in Section 101 and Section 204 of the Act as amended. That since 1937, to August 1st, 1943, the defendant company recognized the plaintiff union as the exclusive bargaining representative for all of its employees performing production and maintenance work, for the purpose of bargaining with respect to rates of pay, hours of employment, and other conditions of employment, and that on August 1st, 1943, the plaintiff union was duly certified by the National Labor Relations Board, acting under the National Labor Relations Act of 1935, as the exclusive bar-

gaining representative for all of the employees of the defendant company in said unit, for the purpose of bargaining with respect to rates of pay, hours of employment, and other conditions of employment.

17. That commencing with June, 1937, and annually thereafter, including June, 1948, the plaintiff union and the defendant company entered into collective bargaining agreements for wages, hours of employment, and other working conditions of all of the employees represented by the said union.

18. That the defendant company is a Wisconsin corporation, and is a public utility employer with offices located at 626 East Wisconsin Avenue, Milwaukee, Wisconsin; and is primarily engaged in the furnishing of illuminating and heating gas to the general public in the cities of Milwaukee, West Bend, West Allis, Wauwatosa, Port Washington and Hartford, and the villages of Shorewood, West Milwaukee, Whitefish Bay, River Hills, Fox Point, Menomonee Falls, Grafton, Slinger, Thiensville, Germantown, Saukville and Jackson, and the townships between the City of Milwaukee and the said outlying cities and villages in the State of Wisconsin. The total franchise area served exceeds five hundred square miles. The total population of [fol. 113] the area is nearly eight hundred thousand The number of customers exceeds two hundred thousand.

19. That the plaintiffs bring this action on behalf of themselves and all others similarly situated, that is to say, the members of the union who are also employees of the defendant company and are authorized so to do.

20. That on or about September 3, 1948, the plaintiff Local 18, United Gas, Coke & Chemical Workers of America commenced an action in the circuit court for Milwaukee County, Wisconsin, as plaintiff against the Wisconsin Employment Relations Board and the Milwaukee Gas Light Company, two of the defendants in the above entitled action, praying the court to determine and declare the rights of the parties, and to declare subchapter 3 of Chapter 111 of the Wisconsin Statutes of 1947 unconstitutional and invaled, and to give such further relief by way of declaration of the rights of the parties as might be lawful, just and proper.

21. That on or about October 13, 1948, the summons in said action so commenced in the circuit court for Milwaukee County was amended by adding thereto as one of the plaintiffs Thomas Lansing, who is one of the plaintiffs in this action.

22. That at the same time an amended complaint was served therein. As appears by said amended complaint, said plaintiff union brought said action as the representative of the employees of the defendant, Milwaukee Gas Light Company, being specifically authorized so to do; and that it was therein alleged that said Thomas Lansing had, through many years, built up a property right in his employment commonly known as "seniority", and it was therein charged that sections 111.62 and 111.63 of said chapter 111 of the Wisconsin Statutes of 1947 threatened to destroy said property right by denying him the full protection of the law.

23. That on November 1, 1948, the defendant Milwaukee [fol. 114] Gas Light Company interposed in said action a demurrer which, omitting venue, title and signature, reads as follows:

> "Now comes the Milwaukee Gas Light Company, one of the defendants in the above entitled action, by Miller, Mack & Fairchild, its attorneys, and demurs to the amended complaint therein on the ground that it appears on the face of said amended complaint that the same does not state facts sufficient to constitute a cause of action."

24. That on or about October 29, 1948, the defendant, Wisconsin Employment Relations Board interposed in said action a demurrer which, omitting venue, title and signature, reads as follows:

> "Now comes the Wisconsin Employment Relations Board, one of the respondents above named, by its attorneys Grover L. Broadfoot, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, and demurs to the amended complaint in the above entitled action on the grounds that it appears on the face of said amended complaint that the same does not state facts sufficient to constitute a cause of action."

25. That said action was brought to trial on the issues of law raised by the separate demurrers of the defendants therein to said amended complaint, and was heard on the 22nd and 26th days of November, 1948, all of the parties to said action having been represented in court by their respective counsel.

26. That on January 6, 1949, the said circuit court for Milwaukee County, Wisconsin, being of the opinion that subchapter 3 of chapter 111 of the Wisconsin Statutes of 1947 was a valid act, and not in violation of nor in conflict with any provision of the Constitution of the State of Wisconsin, nor the Constitution of the United States, nor of any amendment thereto, and not in conflict with the United States Labor Management Relations Act of 1947, and being further of the opinion and having determined that any further amendment of said amended complaint would be unavailing, [fol. 115] ordered that said demurrers to the amended complaint in said action be sustained, and that judgment be entered declaring the rights of the parties and denying the prayer of the plaintiffs, for further relief.

27. That on January 6, 1949, said circuit court for Milwaukee County, Wisconsin entered a judgment as follows:

> "It is hereby Adjudged and Determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor Management Relations Act of 1947, and does not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them . . . any rights, privileges or protection secured to them under either of said Constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to control*led* by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947."

28. That an appeal was taken from the judgment so entered on January 6, 1949, by the plaintiffs in said action to the supreme court of the state of Wisconsin; that thereafter such proceedings were had in said supreme court of the state of Wisconsin; that said judgment of said circuit court for Milwaukee county was affirmed, such judgment of affirmance having been entered on July 12, 1949; and that the remittitur from said supreme court was returned to and filed in the office of the clerk of the circuit court for Milwaukee county, Wisconsin, with no accompanying opinion, declaring that, on consideration of the appeal, it was ordered and adjudged by said supreme court that the judgment of said circuit court of Milwaukee county be and the same was affirmed.

29. That the opinion of the Supreme Court of Wisconsin with respect to the said appeal was filed in the office of the [fol. 116] clerk of that court on July 12, 1949, and is reported under the title: *United Gas, Coke & Chemical Workers of America, Local 18, C. I. O. and another vs. Wisconsin Employment Relations Board and another*, 255 Wis. (Advance Sheets) 154-163, 38 N. W. (2d) (Advance Sheets) 692-697.

30. That no application by appeal, writ of error, certiorari or otherwise to have said judgment reviewed by the supreme court of the United States of America has been made.

Conclusions of Law

1. All of the parties in the action at bar were parties, directly or by representation, in the state court action mentioned and referred to in the answers of the defendants in the action at bar.

2. All of the parties in the action at bar upon whom any judgment to be entered therein could operate were parties, directly or by representation, in said court action.

3. All of the issues in the action at bar were adjudicated in the said state court action.

4. The causes of action in both actions being the same and the parties being identical or in privity, the judgment of the circuit court of Milwaukee county was affirmed by the Supreme Court of Wisconsin is *res adjudicata* and conclusive

of the parties not only as to all the issues adjudicated in that action but as to all issues pertaining to the constitutionality of the statute as applied to the plaintiffs that might have been raised.

5. The declaratory judgment of the circuit court of Milwaukee county, as affirmed by the Supreme Court of Wisconsin introduced into the record in this case, is *res adjudicata* as to all the issues sought to be raised in this action and consequently bars the maintenance of this action.

[fol. 117] 6. The defendants are entitled to judgment dismissing the above entitled action.

Let judgment be entered accordingly.

Dated June 14th, 1950.

By the Court: (S.) F. Ryan Duffy, U. S. Circuit Judge; (S.) Patrick J. Stone, U. S. District Judge.

I dissent from the above findings of fact and conclusions of law for reasons set forth in my dissenting opinion on file herein.

(S.) Robert E. Tehan, U. S. District Judge.

[fol. 118] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, Emil Heimsch, Thomas Lansing, John F. Sheehan, E. F. Regner, Edward P. Regan, La Moine S. Cardinal, Individually, and as Officers of Local 18, United Gas, Coke and Chemical Workers of America, Affiliated with the Congress of Industrial Organization, and Local 18, United Gas, Coke and Chemical Workers of America (CIO), Plaintiffs,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. Fitzgibbon, and Henry C. Rule, Individually and as Commissioners Constituting the Wisconsin Employment Relations Board, and Thomas E. Fairchild, Individually and as Attorney General of the State of Wisconsin, and the Milwaukee Gas Light Company, a Wisconsin Corporation, Defendants

JUDGMENT—Filed June 14, 1950

The above entitled action having come on for trial before the United States District Court for the Eastern District of Wisconsin, on November 28th, 1949, the Honorable F. Ryan Duffy, Patrick Stone and Robert E. Tehan, Judges presiding, and the plaintiffs appearing by Max Raskin and Wm. F. Quick, their attorneys and the defendants, Wisconsin Employment Relations Board and L. E. Gooding, J. E. Fitzgibbon, and Henry C. Rule, appearing by their attorney, Thomas E. Fairchild, and the defendant, Milwaukee Gas Light Company appearing by Miller, Mack & Fairchild, by Gilbert Hardgrove, their attorneys, and the defendant, [fols. 119-121] Thomas E. Fairchild appearing in proper person, and the court having on the 14th day of June, 1950, filed its Findings of Fact, Conclusions of Law and Directions for Judgment,

Now upon all the proceedings herein, It is

Adjudged and decreed that the above entitled action be and the same is hereby dismissed.

Dated June 14, 1950.

By the Court: F. Ryan Duffy, U. S. Circuit Judge; Patrick T. Stone, U. S. District Judge; Robert E. Tehan, U. S. District Judge.

[fol. 122] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

[Title omitted]

PETITION FOR APPEAL—Filed August 8, 1950

Considering themselves aggrieved by the final judgment of this court entered on June 14th, 1950, Arthur St. John, Chester Walczak, Al Fuhrman, Gordon Donnelly, Emil Heimsch, Thomas Lansing, John F. Sheehan, E. F. Regner, Edward P. Regan, La Moine S. Cardinal, individually and as officers of Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and Local 18, United Gas, Coke and Chemical Workers of America, (CIO), the plaintiffs herein, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final judgment and from each and every part thereof; that citation be issued in accordance with law; that an order be made with respect to the appeal bond to be given by said plaintiffs, and that [fol. 123] the amount of security be fixed by the order allowing the appeal, and that the material parts of the record, proceedings and papers upon which said final judgment was based duly authenticated be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, (S.) Max Raskin, Attorney for Plaintiffs-Appellants, 606 West Wisconsin Avenue, Milwaukee, Wisconsin.

[fol. 124] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed August 8, 1950

The plaintiffs in the above entitled cause, in connection with their appeal to the Supreme Court of the United States, hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment of the District Court entered on June 14th, 1950.

The District Court erred:

1. In holding and concluding that the causes of action in both actions being the same and the parties being identical or in privity, the judgment of the circuit court of Milwaukee County, as affirmed by the Supreme Court of Wisconsin, is *res judicata* and conclusive on the parties not only as to all the issues adjudicated in that action but as to all issues pertaining to the constitutionality of the statute as applied to the plaintiffs that might have been [fol. 125] raised.

2. In holding and concluding that the declaratory judgment of the circuit court of Milwaukee county, introduced into the record in this case, is *res judicata* as to all the issues sought to be raised in this action and consequently bars the maintenance of this action.

3. In failing to declare invalid Sub-chapter III, Chapter 111 Wisconsin Statutes 1947, and to enjoin its enforcement.

Wherefore, the plaintiffs pray that the final judgment of the District Court be reversed, and for such other relief as the Court may deem fit and proper.

(S.) Max Raskin, Attorney for Plaintiffs, 606 West Wisconsin Avenue, Milwaukee, Wisconsin.

[fol. 126] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

[Title omitted]

ORDER ALLOWING APPEAL—Filed August 8, 1950

Arthur St. John, Chester Walczak, Al Fuhrman, Gordon Donnelly, Emil Heimsch, Thomas Lansing, John F. Sheehan, E. F. Regner, Edward P. Regan, La Moine S. Cardinal, Individually, and as officers of Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and Local 18, United Gas, Coke and Chemical Workers of America, (CIO), having made and filed their petition praying for an appeal to the Supreme Court of the United States from the final judgment of this court in this cause entered on June 14th, 1950, and from each and every part thereof, and having presented their assignment of errors and prayer for reversal and their statement as to the jurisdiction of the Supreme Court of the United States in such cases made and provided,

[fol. 127] Now Therefore, It Is Hereby Ordered that said appeal be and the same is hereby allowed as prayed for.

It Is Further Ordered that the amount of the appeal bond be and the same is hereby fixed in the sum of Two Hundred Fifty Dollars ($250.00) with good and sufficient surety, and shall be conditioned as may be required by law.

It Is Further Ordered that citation shall issue in accordance with law.

(S.) Robert E. Tehan, Judge of District Court of the United States.

Dated Aug. 8, 1950.

[fols. 128-129] Citation in usual form showing service on Thomas E. Fairchild, filed Aug. 11, 1950, omitted in printing.

[fol. 130] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

[Title omitted]

NOTICE OF APPEAL—Filed August 11, 1950

To Wisconsin Employment Relations Board, L. E. Gooding, J. E. Fitzgibbon and Henry C. Rule, Individually and as Commissioners Constituting the Wisconsin Employment Relations Board, and Thomas E. Fairchild, Individually and as Attorney General of the State of Wisconsin, and the Milwaukee Gas Light Company, a Wisconsin Corporation:

You Are Hereby Notified that the plaintiffs above named hereby appeal to the Supreme Court of the United States, from the judgment entered in the above entitled action on the 14th day of June, 1950, dismissing the complaint of the plaintiffs, and from the whole thereof.

Max Raskin, Attorney for Plaintiffs, 606 West Wisconsin Avenue, Milwaukee, Wisconsin.

Dated Aug. 3, 1950.

[fols. 131-135] Bond on appeal for $250.00, filed Aug. 11, 1950, omitted in printing.

[fol. 136] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

[Title omitted]

DESIGNATION OF PARTS OF RECORD TO BE TRANSMITTED—Filed August 8, 1950

To the Clerk of the District Court for the Eastern District of Wisconsin:

You will please prepare a transcript of the record in the above entitled cause, to be transmitted to the Clerk of

the United States Supreme Court, and include in such transcript the following:

1. Amended Complaint.
2. Order to Show Cause.
3. Answer of Defendant, Milwaukee Gas Light Company.
4. Answer of State Official Defendants.
5. Second Stipulation.
6. Judgment of the Circuit Court of Milwaukee County.
7. Majority and Minority Opinions.
8. Findings of Fact and Conclusions of Law.
9. Judgment.

(S.) Max Raskin, Attorney for Plaintiffs, 606 W. Wisconsin Avenue, Milwaukee, Wisconsin.

Dated Aug. 3, 1950.

[fol. 137] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

[Title omitted]

STIPULATION TO AMEND DESIGNATION OF PARTS OF RECORD ON APPEAL—Filed September 5, 1950

It Is Hereby Stipulated by and between the parties, by their respective attorneys, that the "Designation of Parts of Record to Be Transmitted" be amended as follows:

Strike the word "Judgment" where it appears in the Item 6 and insert in its place the word "Decision"; and after the word "County" in the same item insert the words "Original Exhibit", so that item 6 will then read:

"6. Decision of the Circuit Court of Milwaukee County, Original Exhibit."

Max Raskin, Attorney for Plaintiffs; Beatrice Lampert, Attorney for Wisconsin Employment Relations Board, et al.; J. G. Hardgrove, Miller, Mack & Fairchild, Attorneys for Milwaukee Gas Light Co.

[fol. 138] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 139-140] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed September 22, 1950

Appellant adopts for its statement of points upon which it intends to rely in its appeal to this Court the points contained in its Assignment of Errors heretofore filed.

Appellant designates the entire record, as filed in the above entitled case, for printing by the Clerk of this Court.

Max Raskin, Attorney for Plaintiffs-Appellants.

[fol. 141] [File endorsement omitted.]

[fol. 142] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1950

ORDER NOTING PROBABLE JURISDICTION—October 23, 1950

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

Endorsed on Cover: Enter Max Raskin. File No. 54808. E. Wisconsin, USDC. Term No. 302. Arthur St. John, Chester Walczak, Al Fuhrman, et al., etc, Appellants, vs. Wisconsin Employment Relations Board, L. E. Gooding, et al., etc. Filed September 11, 1950. Term No. 302 O. T. 1950.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 302

ARTHUR ST. JOHN, CHESTER WALCZAK, AL. FUHRMAN, ET AL., ETC.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON AND HENRY C. RULE, INDIVIDUALLY, ETC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

STATEMENT AS TO JURISDICTION

MAX RASKIN,
Counsel for Appellants.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, INDIVIDUALLY AND AS OFFICERS OF LOCAL 18, UNITED GAS COKE AND CHEMICAL WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATION, AND LOCAL 18, UNITED GAS COKE AND CHEMICAL WORKERS OF AMERICA (CIO),

Plaintiffs,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON AND HENRY C. RULE, INDIVIDUALLY AND AS COMMISSIONERS CONSTITUTING THE WISCONSIN EMPLOYMENT RELATIONS BOARD, AND THOMAS E. FAIRCHILD, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, AND THE MILWAUKEE GAS LIGHT COMPANY, A WISCONSIN CORPORATION,

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclos-

ing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause.

Opinion Below

The opinion of the District Court for the Eastern District of Wisconsin, is reported in 90 Fed. Sup. 347. A copy of the opinion, findings of fact, conclusions of law and judgment are attached hereto as Appendix A.

Jurisdiction

The judgment of the district court was entered on June 14th, 1950. A petition for appeal is presented to the district court herewith, to-wit, on August 8th, 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2281.

Questions Presented

Is a judgment of the Circuit Court of Milwaukee County, affirmed by the Supreme Court of Wisconsin, dismissing a complaint on a general demurrer, *res judicata* in a new action between the same parties in the United States District Court, based on a complaint containing sixteen allegations of material fact, which were not in the complaint in the State case?

Does subchapter III of Chapter 111 Wisconsin Statutes, 1947, violate the 13th and 14th Amendments to the Constitution of the United States?

Is subchapter III of chapter 111 in conflict with the Labor-Management Relations Act of 1947?

Statutes Involved

Subchapter III, Chapter 111 Wisconsin Statutes, 1947 (Vol. 1, page 1896), and the Labor-Management Relations Act 1947, are set forth in Appendix B hereto.

Statement

This is an action to restrain the enforcement of a statute of the State of Wisconsin, on the ground that it violates the 13th and 14th Amendments to the United States Constitution and also is in conflict with the Federal Labor-Management Relations Act of 1947.

The District Court for the Eastern District of Wisconsin, declined to pass on the merits of the case and dismissed the complaint, holding that a judgment in a previous action between the same parties in a state court was *res judicata*, one judge dissenting.

The judgment of the state court was entered by the Circuit Court of Milwaukee County on the 6th day of January, 1950.

This was an action for Declaratory relief. The defendants demurred to the complaint on the grounds that the complaint did not state facts sufficient to constitute a cause of action. The Circuit Court sustained the demurrers and the Supreme Court of Wisconsin affirmed the decision of the Circuit Court.

A copy of the judgment of the Circuit Court was received in evidence as an exhibit and is part of the record transmitted to this Court.

The instant case was commenced on the 4th day of October, 1949, and the amended complaint contains 16 allegations of material fact, which were not in the state court complaint.

These allegations are set out in paragraphs 20, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38 and 39 of the amended complaint.

The opinion of the Wisconsin Supreme Court affirming the judgment of the Circuit Court is reported in 255 Wis. 154.

The Questions are Substantial

The Wisconsin Statute (Sec. 111.62) makes any concerted action of Public Utility employees which causes a work stoppage, or slowdown, that interrupts an essential service, a criminal offense, punishable by confinement in the common jail.

It provides that upon petition by either party, any dispute involving labor relations must be settled by arbitration. The award is final and conclusive, subject only to judicial review (Sec. 111.54).

The arbitrators are selected by the Wisconsin Employment Relations Board. The parties have no part in the appointments.

It is the contention of the plaintiffs that this compulsory arbitration is in direct conflict with the Federal Labor-Management Relations Act of 1947 as amended.

The Wisconsin Act also provides the Wisconsin Employment Relations Board may file an action in the Circuit Court for an injunction restraining any violation of the Act (Sec. 111.63).

The plaintiffs contend that the Act violates the 13th and 14th Amendments of the Constitution of the United States.

The Act directly affects the labor relations of many thousands of Public Utility employees and places them in a situation in bargaining relations radically different from any other employees in the state.

Whether or not a judgment of a state court, based on a general demurrer is *res judicata*, concluding a United States Court from inquiring into the claimed unconstitutionality of a state law, is of great public interest.

The District Court was in error in not holding that the construction of a state statute by the court of last resort, did not conclude it from inquiring into the effect of that construction upon the Laws of the United States.

It is submitted that the District Court failed to recognize the impact the Wisconsin Statute has upon the laws of the United States.

Respectfully submitted,

(S.) MAX RASKIN,
Attorney for Plaintiffs-Appellants,
606 West Wisconsin Avenue,
Milwaukee, Wisconsin.

APPENDIX A

Opinions

Findings of Fact and Conclusions of Law

Judgment

U. S. Dist. Court, East. Dist. of Wis. Filed April 28, 1950. B. H. Westfahl, Clerk.

Endorsed: "Filed Apr. 28, 1950. B. H. Westfahl, Clerk."

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

Arthur St. John, et al., *Plaintiffs,*

v.

Wisconsin Employment Relations Board, et al., *Defendants*

Opinion

Plaintiffs bring this action individually and as officers of Local 18, United Gas, Coke and Chemical Workers (CIO) (hereinafter called the "union"), upon behalf of all the union members who are employees of the corporate defendant. Plaintiffs seek a permanent injunction enjoining and restraining the enforcement of subchapter 3 of Chap. 111, Wis. Stats. of 1947,[1] sometimes referred to as the Public Utility Anti-Strike Law.[2]

---

[1] The Wis. Stats. designate this section as subchapter III of Chap. 111. To void confusion we shall refer to this section as subchapter 3 of Chap. 111.

[2] Subchapter 3 of Chap. 111 contains a legislative declaration of policy that "the interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare." It also imposes upon employers and employees the duty of reaching agreements on wages and working

They also seek a declaratory judgment that said subchapter of the statutes is invalid. Defendants Gooding, Fitzgibbons and Rule are the individual commissioners comprising the Wisconsin Employment Relations Board. Defendant Fairchild is the Attorney General for the State of Wisconsin. The corporate defendant (hereinafter called the "company") is a public utility under Wisconsin law, and is the employer of approximately 770 men who are members of the union. The company's utility service is rendered in an area entirely within the State of Wisconsin; however it purchases a substantial portion of its supplies and materials outside the State, and it furnishes gas to manufacturing concerns that produce goods for interstate commerce.

Commencing in June, 1937, and annually thereafter including June, 1948, the union and the company entered into collective bargaining agreements. On August 1, 1943, the Union was certified by the National Labor Relations Board as the exclusive bargaining representative for the employees of the company. The most recent contract expired on June 1, 1949.

In September, 1949, the union filed a petition with the National Labor Relations Board, charging that the company was guilty of an unfair labor practice by refusing to bargain with the union. The National Labor Relations Board did not take any action on this complaint. Thereafter the union and the company did engage in collective bargaining covering wages, pensions and other conditions of employment, but no agreement was reached. The Wisconsin Employment Relations Board then appointed a conciliator whose efforts to bring the union and the company into agree-

---

conditions through collective bargaining. It authorizes the Wisconsin Employment Relations Board to appoint a conciliator when the bargaining process reaches a stalemate (Sec. 111.54) and, where interruption of essential service is likely, authorizes the Wisconsin Employment Relations Board to appoint arbitrators (Sec. 111.55). The award of the arbitrators, subject to judicial review is final and endures for one year (Secs. 111.59 and 111.60). Strikes are forbidden and are made a misdemeanor (Sec. 111.62). The Wisconsin Employment Relations Board is made responsible for the enforcement of the subchapter and is authorized to compel compliance by commencing an action in a circuit court.

ment were unsuccessful. On October 3, 1949, the Wisconsin Employment Relations Board issued an order listing five names as a panel of arbitrators, and ordering the union and the company each to strike one name therefrom, pursuant to provisions of Sec. 111.55, Wis. Stats. The remaining three were to act as arbitrators. On October 4, 1949, the plaintiffs and other employees, acting in concert and agreement, left their employment and started picketing the premises of the company.

On October 6, 1949, the union and the company agreed upon wages, hours, and other conditions of employment but did not agree upon the terms and conditions of the pension plan. The Wisconsin Employment Relations Board and the Attorney General, so the complaint herein alleges, threatened to compel the plaintiffs to submit the unresolved issues of pensions to arbitrators.

On October 13, 1949, in an action commenced in the Circuit Court of Milwaukee County, wherein the Wisconsin Employment Relations Board was plaintiff, the plaintiffs herein were enjoined from calling a strike, or going out on strike, or causing an interruption in the service of the company. It was further ordered that certain of the officers of the union notify all employees who had been called out on strike to resume their employment. This order was issued pursuant to subchapter 3 of Chap. 111. The Attorney General and the Wisconsin Employment Relations Board thereafter caused process to issue looking to the punishment of the plaintiffs and other employees for violating said injunction. The Attorney General likewise threatened to invoke criminal penalties.

In the case at bar, after putting in issue various allegations of the complaint, the defendants pleaded that prior to the commencement of the case at bar plaintiffs chose as their forum for the litigation of the same issues the Circuit Court of Milwaukee County, in which action, on demurrer, the court entered judgment that subchapter 3 of Chap. 111, Wis. Stats. of 1947, was constitutional and valid. Defendants plead such State court action as res judicata.

We proceed to a consideration of the defense of res judicata. The judgment of the Circuit Court of Milwaukee

County, which is pleaded as a bar, provided in part as follows:

> "It Is Hereby Adjudged and Determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947, and does not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, . . . any rights, privileges or protection secured to them under either of said Constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947."

An appeal from this judgment was taken by the plaintiffs in that case to the Supreme Court of Wisconsin, which court affirmed the Circuit Court judgment. Plaintiffs did not appeal to the United States Supreme Court or seek other relief from the action of the Wisconsin Supreme Court. Since the time for appeal to the United States Supreme Court has long since elapsed, the judgment of the Circuit Court, affirmed by the Wisconsin Supreme Court, is conclusive. *Angel v. Bullington*, 330 U. S. 183, 189. See also: *Grubb v. Public Utilities Commission of Ohio*, 281 U. S. 470, 475; *Mitchell v. First National Bank of Chicago*, 180 U. S. 471, 480.

The judgment of the Circuit Court of Milwaukee County, affirmed by the Wisconsin Supreme Court, is res judicata, and bars a subsequent action in this court, if it falls within the rule that a judgment of a State court of competent jurisdiction is binding and conclusive as to all matters put in issue and decided in the State court, and bars a subsequent action in a federal court if the causes of action, subject

matter and parties are the same. *Angel v. Bullington*, supra, pp. 192-193; *Treinies v. Sunshine Mining Co., et al.*, 308 U. S. 66, 75-78. Indeed such a judgment is binding as to all relevant issues which could have been raised and litigated therein. *Heiser v. Woodruff, et al.*, 327 U. S. 726, 735; *Troxell, Administratrix v. Delaware, Lackawanna & Western Railroad Co.*, 227 U. S. 434, 440; *Reinkey v. Wilkins*, 172 Wis. 515, 520.

We think it clear that the causes of action and the subject matter are the same in the two suits. The cause of action in the case at bar is based upon the same facts as in the State court action. This is so even though some of the actions which could only be considered in a prospective way by the State court have since come to pass. The fact that a strike was actually called since the State court judgment was rendered does not create a different situation. The allegations in the pleadings in the two cases are substantially the same. The facts necessary to sustain the two actions are the same. As for the subject matter, the issues in the case at bar and in the State court action arose from the claimed repugnancy of subchapter 3 of Chap. 111, Wis. Stats., to the federal Constitution and to the Labor-Management Relations Act of 1947, and those issues were decided against the union in the State court action. The questions essential to a determination herein are the same as those of the State court case.

It is true that the opinion of the Wisconsin Supreme Court contains some equivocal language which furnishes some foundation for the contention of plaintiffs herein that all of the issues were not squarely met. Nevertheless it is the action which the Supreme Court took which is important rather than any reasons which it might give for such action. The appeal was from the judgment of the Circuit Court. Included in the issues squarely raised were the claimed repugnancy of subchapter 3 of Chap. 111 to the federal Constitution and to the Labor-Management Relations Act of 1947. The Wisconsin Supreme Court was empowered to reverse, affirm or modify the Circuit Court judgment; it did not reverse or modify, but affirmed the judgment without

any condition or qualification. The mandate of the Wisconsin Supreme Court did not affirm an order sustaining a demurrer, but rather it affirmed the judgment of the Circuit Court of Milwaukee County in that case. Moreover, it is not important whether we refer to the judgment which was affirmed as a judgment of the Circuit Court or of the Supreme Court.

Plaintiffs' argument that all of the merits of the controversy were not passed upon is conclusively answered in *Angel v. Bullington*, supra, where the controlling opinion holds (p. 190):

> "It is suggested that the North Carolina Supreme Court did not adjudicate the 'merits' of the controversy. It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the States . . .
>
> "The 'merits' of a claim are disposed of when it is refused enforcement. If an asserted federal claim is denied enforcement on a professed local ground, but a so-called local ground which is subject to review here because it is in fact the adjudication of a federal question, then the 'merits' of that claim were adjudicated in the only sense that adjudication of the 'merits' is relevant to the principles of res judicata . . ."

As the State court litigation, in both the Circuit Court and Supreme Court, involved questions and issues identical to those present and raised in the instant action, and the plaintiffs not having appealed to the United States Supreme Court, it follows that, if the parties to each of the actions are the same, plaintiffs herein are precluded from further litigating the questions and issues in this action under the doctrine of res judicata.

We now focus our attention on the question whether the parties to the State court action were the same as the parties

in the case at bar. Manifestly they are not identical. Certain individuals are named in the pleadings in the case at bar, both as plaintiffs and defendants, who were not thus named in the State court action. The union and Thomas Lansing, its then president, were plaintiffs in the State court action and they are also plaintiffs in the case at bar. The parties plaintiff are not changed because the amended complaint herein now names Arthur St. John, the current president of the union, and lists other officers of the union and members of its bargaining committee. Plaintiffs in both cases are the union and the officers thereof who represent the membership. We hold that the parties plaintiff are the same in both actions.

The Wisconsin Employment Relations Board and the Milwaukee Gas Light Company were named defendants in both actions. In addition, the three individuals who are the Wisconsin Employment Relations Board are named individually in the case at bar, as well as Thomas E. Fairchild, the Attorney General of the State of Wisconsin. However, the three members of the board are sued in the present action only as members of the board, and not in their capacity as private citizens. The Attorney General is sued only in his official capacity, that of attorney representing the Wisconsin Employment Relations Board. We hold that the parties defendant are the same in both actions.

The fact that the union seeks an injunction in the case at bar in addition to the declaratory judgment sought in both cases does not prevent the judgment in the State court action from operating as an estoppel in this court. 50 C. J. S., Judgments, Sec. 900 (a). A change in the form or measure of the relief asked in the complaint in a second cause of action does not preclude the application of the doctrine of res judicata. 30 Am. Juris., Judgments, Sec. 176.

A valid distinction cannot be drawn between a judgment entered in a State court action sustaining a demurrer to a complaint and a judgment rendered after a trial upon the merits. In *Northern Pacific Railway Co. v. Slaght,* 205 U. S. 122, 130, the court stated:

> ". . . It is well established that a judgment on demurrer is as conclusive as one rendered upon proof."

In *Ellis v. Northern Pacific Railroad Co.*, 80 Wis. 459, 465, the court said:

> ". . . It is sufficient to say that by repeated decisions it has become the settled law in this State that the decision of this court upon a demurrer is conclusive upon the questions legitimately involved and is res adjudicata in that case . . ."

In *Lewko v. Chas. A. Krause Milling Co.*, 219 Wis. 6, 8, the court said:

> "The plaintiff first argues that a decision sustaining a demurrer is not res judicata because there has been no trial upon the merits. In this connection it is considered that the plaintiff is in error . . ."

It follows that each member of the union upon whose behalf the State court action was brought is bound by the judgment that was entered in that action. This court has no discretion to pass upon the merits of the important questions raised in the case at bar, and ignore the defense of res judicata. In *30 Am. Juris., Judgments, Sec. 254,* it is said, at p. 983:

> ". . . Where the prior judgment is properly brought to the attention of the court, the question whether the doctrine of res judicata should be applied is one of law, and not for the discretion of the court."

The full faith and credit clause of the United States Constitution (Art. IV, Sec. 1) applies to federal courts. *28 U.S.C. 1738.* Federal courts are required to give full faith and credit to the judgments of State courts. *Davis* v. *Davis,* 305 U.S. 32, 39-40.

The defendants' defense of res judicata must be sustained. Formal findings of fact and conclusions of law, together with formal judgment, will be prepared by counsel for defendants and submitted to counsel for plaintiffs for approval as to form, and if so approved then to the court for signatures and entry; but if not approved, then, upon notice, to the court for settlement, signatures and entry.

Dated at Milwaukee, Wisconsin, this 28th day of April, A. D. 1950.

(Sgd.) F. RYAN DUFFY,
U. S. Circuit Judge;

(Sgd.) PATRICK T. STONE,
U. S. District Judge;

____ ____,
U. S. District Judge.

DISSENTING OPINION OF HONORABLE ROBERT E. TEHAN, United States District Judge

The majority opinion states the facts which brought this action to this court and concludes that the plaintiffs have already had a complete adjudication in the State courts of all of the issues they raise here and thus are now barred from litigating these issues by the doctrine of res judicata. Our dissent is prompted by the belief that the issues raised in this action were not finally adjudicated in the State action and that plaintiffs are entitled to an adjudication of these issues.

In the complaint which plaintiffs filed in the Circuit Court of Milwaukee County, Wisconsin, plaintiffs alleged that subchapter 3 of Chap. 111, Wis. Stats., 1947 was void in that it was in conflict with the Wisconsin Constitution, the Federal Constitution and the Labor Management Relations Act.

The judgment of the Circuit Court adjudicated each of the issues raised in the plaintiffs' complaint in that action. This judgment was then appealed to the Supreme Court of the State of Wisconsin, and that court issued an opinion and affirmed the judgment of the Circuit Court.[3] The majority opinion herein holds that the Circuit Court judgment, affirmed by the Wisconsin Supreme Court, is conclusive to bar plaintiffs in this action.

I question first the assertion that the judgment of the Circuit Court of Milwaukee County is a bar in this action.

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[3] *United G., C. & C. Workers* v. W[illegible] *E. R. Board*, 255 Wis. 154, 38 N. W. (2d) 692.

When a party appeals from a judgment of a Circuit Court of Wisconsin to the Wisconsin Supreme Court, and the Circuit Court's judgment is affirmed, is the judgment which then determines the rights of the parties to that action the judgment of the Circuit Court? The Wisconsin Supreme Court has said that it is not.

In the case of *Ean* v. *The Chicago, Milwaukee & St. Paul R. Co.*, 101 Wis. 166, the Supreme Court considered the effect of its affirmance of a Circuit Court judgment. In that instance, the Supreme Court had affirmed a judgment of an action commenced in the superior court of Milwaukee County. After the appeal was determined, the cause was remanded. Then, within one year of the date of the entry of the judgment in the superior court, that court entered an order vacating its judgment and permitted the plaintiff to plead further. The order purported to be made under the provisions of R. S. 1878, sec. 2832. The provisions of this section, according to the Supreme Court opinion, were "substantially to the effect that the court or judge may, in discretion and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment against him 'through his mistake, inadvertence, surprise or excusable neglect'." The court held that the section applied only to judgments of the Circuit Court and "not to those which by operation of law have become judgments of this court." The court clearly held that when a mandate is remanded and the lower court enters a final judgment in accordance therewith, "the judgment so entered is, in legal effect, the judgment of this court. It is none the less true in cases where there is an affirmance than when some other directions are given." In other words, the court noted that after an appeal, the judgment in any case is the judgment of the Supreme Court and that the legal consequences of that judgment are not necessarily identical as those which attach to the lower court judgment. To the same effect see *Crowns* v. *Forest Land Co.*, 100 Wis. 554 and *Hoan* v. *Journal Co.*, 241 Wis. 483. Thus we see that when a judgment of the Circuit Court is considered by the Supreme Court and the Supreme Court renders an opinion as to the propriety of that judgment, the Supreme

Court has, in legal effect, issued a new judgment which becomes the judgment of that case. Therefore, it is only the judgment of the Supreme Court which can be pleaded in bar under the doctrine of res judicata.

The full faith and credit clause of the United States Constitution requires that in any particular instance a Federal Court must give to a judgment of a State Court the same legal effect as the courts of that state would give to it. *Covington v. First National Bank*, 198 U. S. 100; *Jarrard v. Southeastern Shipbuilding Corporation*, 163 F. (2d) 960. In the instant case, we must consider the judgment which is pleaded in bar in the light in which it should be considered by a Circuit Court of Wisconsin had the plaintiffs commenced this action in such a court. We think that in striving to determine what legal effect the courts of Wisconsin would give to the judgment now pleaded in bar, it is proper that we look to the opinion which the Supreme Court rendered at the time it handed down its judgment in that case. In so doing we recognize that there is a distinction between a judgment or findings of fact and an opinion. *49 C.J.S. sec. 4.* But we believe that since an opinion explains the basis in law upon which the judgment is rendered, it is a proper guide in determining what the legal effect of that judgment should be. It is proper for a Federal Court to examine the opinion of a State Court to see what issues were determined. *San Jose Land and Water Co. v. San Jose Ranch Co.*, 189 U. S. 177; *Gross v. United States Mortgage Co.*, 108 U. S. 477; *Carson v. Three States Lumber Co.*, 142 F. 893, affirmed 149 F. 377.

The majority opinion herein dismisses the Supreme Court opinion with the observation that it contains "some equivocal language which furnishes some foundation for the contention of plaintiffs herein that all of the issues were not squarely met." They pass over language which seems to us clearly to indicate that the Supreme Court felt it should not pass on certain constitutional questions until a factual situation was presented to the Court at a later date. The majority opinion places complete reliance on the words "Judgment Affirmed", which appear at the end of the opinion.

If the Supreme Court had merely affirmed without opinion there would be no dissent, and if the Supreme Court's opinion had discussed only one of the constitutional questions and remained silent on the other questions raised by plaintiffs, we would have reluctantly concurred.

The clear language of the Supreme Court's opinion on its position on certain constitutional questions requires, in my mind, the same consideration and treatment that was given by a distinguished court in the case of *Moran Towing and Transportation Co., Inc. v. Navigazione Libera Triestina, S.A.*, 92 F. (2d) 37. We think the Second Circuit Court of Appeals was there confronted with the same problem we face here. The Moran Company had furnished tugboat service and a tug master as a pilot for the N.L.T. under a contract which provided:

> " 'When the captain of any tug engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or any other licensed pilot becomes a servant of the owner in respect to the giving of orders to any of the tugs engaged in the assisting service and in respect to the handling of said vessel and neither the tugs or their owners or agents shall be liable for any damage resulting therefrom.' "

During the maneuvering of the vessel, property of The Robins Company was damaged and it sued Moran and N.L.T. in the New York State Courts for damages. The trial court found negligence on the part of the pilot, directed judgment for The Robins Company against Moran, and dismissed the complaint against N.L.T. The trial judge filed an opinion which was made part of the judgment roll in the State Court in which he indicated that he adjudged that Moran could not divest itself of liability to a third person by means of such a contractual provision and also that the contractural provision would not relieve Moran even as to N.L.T. because the tug master who performed the pilot duties was not a licensed pilot such as the clause called for.

An appeal was taken from this judgment to the New York Appellate Division which affirmed the judgment without opinion. Then an appeal was taken to the Court of Appeals which also affirmed the judgment and issued an opinion. Thereafter, Moran paid the judgment and brought action in Federal Court against N.L.T. to recover the amount of the judgment and its disbursements, claiming that N.L.T. was an indemnitor under the terms of the "pilotage clause". The trial court dismissed the libel on the ground that the issue of liability for the acts of the pilot had been determined by the State Court and could not again be litigated. This judgment was appealed to the Circuit Court of Appeals, and it is the opinion of this court, composed of Circuit Judges Learned Hand, Augustus N. Hand and Harrie B. Chase (the opinion was written by Augustus Hand) which we cite in support of our position. The court looked to the language of the State Court opinions to determine what it was that the trial court and then the Court of Appeals had decided. It concluded that while the Court of Appeals had affirmed the judgment of the trial court, the language which the Court of Appeals used in its opinion indicated that it did not agree with the total adjudication of the trial court. This conclusion was based upon the assumption that it was proper to look to the opinion of the State Courts to determine what was there decided. The propriety of this assumption was discussed by the court,

> "The appellee, however, cites Russell v. Russell, 134 F. 840 (C.C.A. 3), and Oglesby v. Attrill, 20 F. 570 (Wallace, J., in U.S. Circuit Court), as holding that an unconditional affirmance of a judgment by an appellate court, though rendered on entirely different grounds or only on some of the grounds upon which the decision of the lower court was rendered, leaves the questions determined by the lower court as res judicata in all respects. To treat as controlling the findings of a trial court when the appellate court upsets or disregards them and renders a decision of affirmance on different grounds furnishes parties to other litigations affected by the decision a false guide. There seems to be a paucity of authority on this question, and with all due re-

spect we cannot subscribe to such a formal treatment of the situation. * * *"

We, too, feel it is not proper to deprive parties of substantial rights by "a formal treatment of the situation".

In the Moran case the Circuit Court of Appeals did not hesitate to look to the opinion of the State Appellate Court to determine that the judgment of the appellate court was different than that of the State trial court. So in the instant case we look to the opinion of the Wisconsin Supreme Court which, to us, indicates clearly that its judgment was different than that rendered by the circuit court.

Let us now examine the opinion of the Wisconsin Supreme Court in this case in the light of the Moran case. The plaintiff public utility employees and their union claimed they were aggrieved by an act of the Wisconsin legislature and commenced an action for declaratory relief, alleging that the act of the legislature was violative of their rights under the Constitutions of the United States and State of Wisconsin and repugnant to the Labor Management Act of 1947. The defendants demurred and the circuit court sustained the demurrer and entered judgment finding against plaintiffs on each of these grounds. The matter was appealed to the Wisconsin Supreme Court and that court, after reciting the facts, began its opinion with the following language:

> "We are first confronted with a fundamental rule of law that the constitutionality of a statute is not to be determined as a hypothetical question or upon assumed facts or unreal possibilities. The court should not anticipate a question of constitutional law before it is to be applied to the precise facts before it and should not attempt to test the operation of a law under every conceivable set of circumstances. This rule is illustrated by the following quotations from prior decisions of this court:
>
> "'Sound judicial policy precludes the court from considering the question of the constitutionality of a legislative act unless a decision respecting its validity is essential to the determination of some controversy

calling for judicial solution.' *State ex rel. Rosenheim v. Frear*, 138 Wis. 173, 176, 119 N. W. 894.

"'The legislature, subject to the constitutions of the United States and of this state, is supreme in its particular field, and this court will not declare laws unconstitutional unless it clearly appears beyond reasonable doubt that they contravene constitutional provisions. See *Payne v. Racine*, 217 Wis. 550, 259 N. W. 437; *Petition of Breidenbach*, 214 Wis. 54, 252 N. W. 366; *Doering v. Swoboda*, 214 Wis. 481, 253 N. W. 657; *State ex rel. Carnation M. P. Co. v. Emery*, 178 Wis. 147, 189 N. W. 564, and the numerous earlier decisions cited therein.' *State ex rel. Atty. Gen. v. Wisconsin Constructors*, 222 Wis. 279, 284, 268 N. W. 238.

"'A constitutional question will not be decided until it is brought directly in issue by the facts involved in the instant case.' *Democrat Printing Co. v. Zimmerman*, 245 Wis. 406, 411, 14 N. W. (2d) 428.

"Therefore, upon this record, we can only determine whether or not ch. 414, Laws of 1947, is a valid and constitutional enactment. The plaintiffs contend that it is not because it contains unlawful delegations of legislative and judicial powers. * * *"

The court's opinion proceeds to a discussion of the questions of delegation of legislative and judicial powers (neither of which issues is involved in these proceedings), decides the issue of delegation of legislative powers, and continues with the following language:

"Upon the record here there is no question of the delegation of judicial power. This question and other contentions and arguments of the plaintiffs can be disposed of best when a case involving a particular question is presented and fully argued. If any person or agency, in the enforcement of the law, should attempt to usurp unlawful legislative or judicial powers there is an adequate remedy."

The Wisconsin Court's opinion in effect says: We will not decide the principal constitutional objections raised by the

plaintiffs. We will only decide the question of whether the statute in question involves an unlawful delegation. The door, however, is not closed on your grievances. At a more propitious time and place, when a matured fact situation has developed, you will have your day in court.

Abbreviating the court's own language, it said:

> "The court should not anticipate a question of constitutional law before it is to be applied to the precise facts before it and should not attempt to test the operation of a law under every conceivable set of circumstances. * * * Therefore, upon this record, we can only determine whether or not (the statute) is a valid and constitutional enactment. * * * This question (delegation of judicial power) and other contentions and arguments of the plaintiffs can be disposed of best when a case involving a particular question is presented and fully argued. * * *"

Such language would never have been used by a court which did not conclude that a final disposition of the issues again raised in these proceedings was open to a future determination such as sought here.

We must also remember that the action in the State court was one for declaratory judgment. A judgment resulting from a declaratory judgment action is not res judicata to issues which were not actually determined. *Restatement of Judgments*, Sec. 77, Comment b. states:

> "*Effect of declaratory judgment on subsequent controversies.* The effect of a declaratory judgment in subsequent controversies between the parties depends upon the scope of the declaration of rights made by the judgment. As to matters declared by the judgment, the parties are precluded from relitigating them; as to matters not declared by the judgment, although a declaration might have been made as to them, the parties are not so precluded.
>
> "Where a plaintiff seeks a declaratory judgment, he is not seeking to enforce a claim against the defendant. He is seeking rather a judicial declaration as to the existence and effect of a relation between him and the

> defendant. The effect of the judgment, therefore, unlike a judgment for the payment of money, is not to merge a cause of action in the judgment or to bar it. The effect of a declaratory judgment is rather to make res judicata the matters declared by the judgment, thus precluding the parties to the litigation from relitigating these matters."

The majority opinion places great reliance on the case of *Angel v. Bullington*, 330 U. S. 183. I feel that the Angel case is clearly distinguishable from the case at bar. The majority opinion in the Angel case held that the North Carolina Supreme Court adjudicated all of the federal issues involved when it ruled that it had no jurisdiction to consider the claim of Bullington. In other words, when the North Carolina Court ruled that a state statute removed from North Carolina courts jurisdiction to consider Bullington's claim, there was implicit in that ruling the determination that the state statute was constitutional. I think it is impossible to find in the Wisconsin Supreme Court's statement, that certain issues are not before it because a proper factual situation has not developed, any implicit ruling that the Wisconsin statute is not in conflict with the Federal Constitution or the Labor Management Relations Act.

Another clear basis of distinction rests in the fact that the action before the Wisconsin State court, unlike the Angel case, was one seeking a declaratory judgment, and that a declaratory judgment, as noted in *Restatement of Judgments*, sec. 77, is conclusive only as to matters actually determined and not as to those which might have been determined.

The plaintiffs in the instant case went first to the Wisconsin courts to obtain a ruling on the validity of the Wisconsin statute. The Wisconsin Supreme Court, in my opinion, denied them a complete ruling at that time, but held open the door of the court for their return at some later date when the factual situation warranted such a return.

Following this a strike occurred and the challenged statute was put into operation. Plaintiffs then came to this court and asked for a ruling on the validity of the statute. This we have denied them by the application of res adjudicata. The doctrine of res adjudicata is a wholesome one, but I do not believe it was ever intended to work such a result.

The decision of this court has not only refused them that ruling, but by holding that the Wisconsin decision was res judicata on all the issues raised here, are we not then closing the door to the Wisconsin courts that the Supreme Court of the state held open? There seems substantial authority for the proposition that this court's ruling on the question of res judicata, if it becomes final, will, in turn, be res judicata on that issue and thus bar the plaintiffs from ever returning to the Wisconsin court. *Freeman on Judgments*, 5th Ed., p. 1498.

Dated, Milwaukee, Wisconsin, this 28th day of April, A. D. 1950.

(S.) ROBERT E. TEHAN,
U. S. District Judge.

Endorsed: "Filed June 14, 1950. B. H. Westfahl, Clerk."

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, Individually, and as officers of Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and LOCAL 18, UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, (CIO), *Plaintiffs*,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON and HENRY C. RULE, individually and as Commissioners constituting the Wisconsin Employment Relations Board, and THOMAS E. FAIRCHILD, individually and as Attorney General of the State of Wisconsin, and the MILWAUKEE GAS LIGHT COMPANY, a Wisconsin corporation, *Defendants*

Findings of Fact and Conclusions of Law

The above entitled action having come on for trial before the United States District Court for the Eastern District of Wisconsin on November 28th, 1949, the Honorable F. Ryan Duffy, Patrick Stone and Robert E. Tehan, Judges presiding, and the plaintiffs appearing by Max Raskin and Wm. F. Quick, their attorneys and the defendants, Wisconsin Employment Relations Board and L. E. Gooding, J. E. Fitzgibbon, and Henry C. Rule appearing by their attorney, Thomas E. Fairchild, and the defendant Milwaukee Gas Light Company appearing by Miller, Mack & Fairchild, by Gilbert Hardgrove, their attorneys, and the defendant Thomas E. Fairchild appearing in proper person, and a Second Stipulation of Facts having been filed and the court having heard the arguments and received briefs of all par-

ties, and being fully advised in the premises, does hereby make the following findings of fact and conclusions of law.

Findings of Fact

1. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00) pursuant to Section 1331 of Title 28 of the U.S.C.A.

2. That the plaintiff, Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and hereinafter referred to as the union, is an unincorporated association of employees employed in the production, maintenance, operation, construction and meter reading, of approximately seven hundren seventy (770) in number, all of whom are employed with the defendant, Milwaukee Gas Light Company, and that the office of the said union is in the city of Milwaukee, Milwaukee County, Wisconsin; that it is a labor organization as defined in Section 2-(5) of the Labor Management Relations Act of 1947.

3. That the plaintiff, Chester Walczak, is a citizen of the United States, and a resident of the city and county of Milwaukee, Wisconsin, and is the International Representative of said union.

4. That the plaintiff, Arthur St. John, is a citizen of the United States, and a resident of Waukesha County, Wisconsin, and is the president of the said union. That he is an employee of the Milwaukee Gas Light Company.

5. That the plaintiff, Al Fuhrman, is a citizen of the United States, and a resident of Milwaukee County, Wisconsin, and is the vice president of the said union. That he is an employee of the Milwaukee Gas Light Company.

6. That the plaintiff, Emil Heimsch, is a citizen of the United States, and a resident of Milwaukee, Wisconsin, and is the Chairman of the Bargaining Committee of the Union. That he is an employee of the Milwaukee Gas Light Company.

7. That the plaintiff, Thomas Lansing, is a citizen of the United States, and a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

8. That the plaintiff, John F. Sheehan, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

9. That the plaintiff, E. F. Regner, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

10. That the plaintiff, Edward P. Regan, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

11. That the plaintiff, La Moine S. Cardinal, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is a member of the Bargaining Committee of said union. That he is an employee of the Milwaukee Gas Light Company.

12. That the plaintiff, Gordon Donnelly, is a citizen of the United States, and is a resident of Milwaukee, Wisconsin, and is the recording secretary of said union. That he is an employee of the Milwaukee Gas Light Company.

13. That the defendant, L. E. Gooding, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city of Fond du Lac, Fond du Lac County, Wisconsin. The defendant, J. E. Fitzgibbon, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the

United States, and a resident of the city of Milwaukee, Milwaukee County, Wisconsin. The defendant, Harry C. Rule, is a Commissioner of the Wisconsin Employment Relations Board, and duly appointed and qualified to act as such Commissioner, and is a citizen of the United States, and a resident of the city of Eau Claire, Eau Claire County, Wisconsin. That all of said defendants constitute the Wisconsin Employment Relations Board, which has offices at 110 East Wisconsin Avenue, Milwaukee, Wisconsin. That said Wisconsin Employment Relations Board is established pursuant to and under the Statutes of the state of Wisconsin, 111.03, Wis. Stats. of 1947, and is composed of the aforesaid commissioners; that said Board has for its duty the enforcement and compliance with subchapter 3 of Chapter 111 of the Laws of the State of Wisconsin titled "Public Utilities" as set forth in sections 111.50 through 111.64 Wisconsin Statutes of 1947.

14. That the defendant, Thomas E. Fairchild, is the duly elected, qualified, and acting Attorney General of the State of Wisconsin, and as such is charged with the enforcement of the laws of the State of Wisconsin, is a citizen of the United States and is a resident of the Village of Verona, Dane County, Wisconsin.

15. That the members of the union, including the plaintiffs, have assembled and associated themselves in the said union for the purpose of collective bargaining and otherwise dealing with the defendant company concerning hours of employment, rates of pay, pensions, working conditions, grievances arising out of employment, and for other mutual aid and protection, and by such means to improve their economic and social conditions as citizens of the United States.

16. The Labor Management Relations Act of 1947, adopted by the Congress, is a law regulating commerce as set forth in Section 101 and Section 204 of the Act as amended. That since 1937, to August 1st, 1943, the defendant company recognized the plaintiff union as the exclusive bargaining representative for all of its employees performing production and maintenance work, for the purpose of

bargaining with respect to rates of pay, hours of employment, and other conditions of employment, and that on August 1st, 1943, the plaintiff union was duly certified by the National Labor Relations Board, acting under the National Labor Relations Act of 1935, as the exclusive bargaining representative for all of the employees of the defendant company in said unit, for the purpose of bargaining with respect to rates of pay, hours of employment, and other conditions of employment.

17. That commencing with June, 1937, and annually thereafter, including June, 1948, the plaintiff union and the defendant company entered into collective bargaining agreements for wages, hours of employment, and other working conditions of all of the employees represented by the said union.

18. That the defendant company is a Wisconsin corporation, and is a public utility employer with offices located at 626 East Wisconsin Avenue, Milwaukee, Wisconsin; and is primarily engaged in the furnishing of illuminating and heating gas to the general public in the cities of Milwaukee, West Bend, West Allis, Wauwatosa, Port Washington and Hartford, and the villages of Shorewood, West Milwaukee, Whitefish Bay, River Hills, Fox Point, Menomonee Falls, Grafton, Slinger, Thiensville, Germantown, Saukville and Jackson, and the townships between the City of Milwaukee and the said outlying cities and villages in the State of Wisconsin. The total franchise area served exceeds five hundred square miles. The total population of the area is nearly eight hundred thousand. The number of customers exceeds two hundred thousand.

19. That the plaintiffs bring this action on behalf of themselves and all others similarly situated, that is to say, the members of the union who are also employees of the defendant company and are authorized so to do.

20. That on or about September 3, 1948, the plaintiff Local 18, United Gas, Coke & Chemical Workers of America commenced an action in the circuit court for Milwaukee

County, Wisconsin, as plaintiff against the Wisconsin Employment Relations Board and the Milwaukee Gas Light Company, two of the defendants in the above entitled action, praying the court to determine and declare the rights of the parties, and to declare subchapter 3 of Chapter 111 of the Wisconsin Statutes of 1947 unconstitutional and invalid, and to give such further relief by way of declaration of the rights of the parties as might be lawful, just and proper.

21. That on or about October 13, 1948, the summons in said action so commenced in the circuit court for Milwaukee County was amended by adding thereto as one of the plaintiffs Thomas Lansing, who is one of the plaintiffs in this action.

22. That at the same time an amended complaint was served therein. As appears by said amended complaint, said plaintiff union brought said action as the representative of the employees of the defendant, Milwaukee Gas Light Company, being specifically authorized so to do; and that it was therein alleged that said Thomas Lansing had, through many years, built up a property right in his employment commonly known as "seniority", and it was therein charged that sections 111.62 and 111.63 of said chapter 111 of the Wisconsin Statutes of 1947 threatened to destroy said property right by denying him the full protection of the law.

23. That on November 1, 1948, the defendant Milwaukee Gas Light Company interposed in said action a demurrer which, omitting venue, title and signature, reads as follows:

> "Now comes the Milwaukee Gas Light Company, one of the defendants in the above entitled action, by Miller, Mack & Fairchild, its attorneys, and demurs to the amended complaint therein on the ground that it appears on the face of said amended complaint that the same does not state facts sufficient to constitute a cause of action."

24. That on or about October 29, 1948, the defendant, Wisconsin Employment Relations Board interposed in said

action a demurrer which, omitting venue, title and signature, reads as follows:

> "Now comes the Wisconsin Employment Relations Board, one of the respondents above named, by its attorneys Glover L. Broadfoot, Attorney General, Stewart G. Honeck, Deputy Attorney General, and Beatrice Lampert, Assistant Attorney General, and demurs to the amended complaint in the above entitled action on the grounds that it appears on the face of said amended complaint that the same does not state facts sufficient to constitute a cause of action."

25. That said action was brought to trial on the issues of law raised by the separate demurrers of the defendants therein to said amended complaint, and was heard on the 22nd and 26th days of November, 1948, all of the parties to said action having been represented in court by their respective counsel.

26. That on January 6, 1949, the said circuit court for Milwaukee County, Wisconsin, being of the opinion that subchapter 3 of chapter 111 of the Wisconsin Statutes of 1947 was a valid act, and not in violation of nor in conflict with any provision of the Constitution of the State of Wisconsin, nor the Constitution of the United States, nor of any amendment thereto, and not in conflict with the United States Labor Management Relations Act of 1947, and being further of the opinion and having determined that any further amendment of said amended complaint would be unavailing, ordered that said demurrers to the amended complaint in said action be sustained, and that judgment be entered declaring the rights of the parties and denying the prayer of the plaintiffs, for further relief.

27. That on January 6, 1949, said circuit court for Milwaukee County, Wisconsin entered a judgment as follows:

> "It is hereby Adjudged and Determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State

of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor Management Relations Act of 1947, and does not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them . . . any rights, privileges or protection secured to them under either of said Constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947."

28. That an appeal was taken from the judgment so entered on January 6, 1949, by the plaintiffs in said action to the supreme court of the State of Wisconsin; that thereafter such proceedings were had in said supreme court of the State of Wisconsin; that said judgment of said circuit court for Milwaukee county was affirmed, such judgment of affirmance having been entered on July 12, 1949; and that the remittitur from said supreme court was returned to and filed in the office of the clerk of the circuit court for Milwaukee county, Wisconsin, with no accompanying opinion, declaring that, on consideration of the appeal, it was ordered and adjudged by said supreme court that the judgment of said circuit court of Milwaukee county be and the same was affirmed.

29. That the opinion of the Supreme Court of Wisconsin with respect to the said appeal was filed in the office of the clerk of that court on July 12, 1949, and is reported under the title: *United Gas, Coke & Chemical Workers of America, Local 18, C.I.O. and another vs. Wisconsin Employment Relations Board and another*, 255 Wis. (Advance Sheets) 154-163, 38 N.W. (2d) (Advance Sheets) 692-697.

30. That no application by appeal, writ of error, certiorari or otherwise to have said judgment reviewed by the supreme court of the United States of America has been made.

Conclusions of Law

1. All of the parties in the action at bar were parties, directly or by representation, in the state court action mentioned and referred to in the answers of the defendants in the action at bar.

2. All of the parties in the action at bar upon whom any judgment to be entered therein could operate were parties, directly or by representation, in said court action.

3. All of the issues in the action at bar were adjudicated in said state court action.

4. The causes of action in both actions being the same and the parties being identical or in privity, the judgment of the circuit court of Milwaukee county was affirmed by the Supreme Court of Wisconsin is *res adjudicata* and conclusive of the parties not only as to all the issues adjudicated in that action but as to all issues pertaining to the constitutionality of the statute as applied to the plaintiffs that might have been raised.

5. The declaratory judgment of the circuit court of Milwaukee county, as affirmed by the Supreme Court of Wisconsin introduced into the record in this case, is *res adjudicata* as to all the issues sought to be raised in this action and consequently bars the maintenance of this action.

6. The defendants are entitled to judgment dismissing the above entitled action.

Let judgment be entered accordingly.

Dated June 14th, 1950.

By the Court:

(S) F. Ryan Duffy,
U. S. Circuit Judge.
(S) Patrick J. Stone,
U. S. District Judge.

I dissent from the above findings of fact and conclusions of law for reasons set forth in my dissenting opinion on file herein.

(S) Robert E. Tehan
U. S. District Judge.

And afterwards, to-wit: on the 104th day of said Term to-wit: on the 14th day of June, A. D. 1950, the following proceedings were had, to-wit:

Endorsed: "Filed June 14, 1950, B. H. Westfahl, Clerk."

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, Individually, and as officers of Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and LOCAL 18, UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, (CIO), Plaintiffs,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. GITZGIBBON, and HENRY C. RULE, individually and as Commissioners constituting the Wisconsin Employment Relations Board, and THOMAS E. FAIRCHILD, individually and as Attorney General of the State of Wisconsin, and the MILWAUKEE GAS LIGHT COMPANY, a Wisconsin corporation, Defendants.

JUDGMENT

The above entitled action having come on for trial before the United States District Court for the Eastern District of Wisconsin, on November 28th, 1949, the Honorable F. Ryan Duffy, Patrick Stone and Robert E. Tehan, Judges presiding, and the plaintiffs appearing by Max Raskin and Wm. F. Quick, their attorneys and the defendants, Wisconsin Employment Relations Board and L. E. Gooding, J. E. Fitzgibbon, and Henry C. Rule, appearing by their attorney, Thomas E. Fairchild, and the defendant, Milwaukee Gas Light Company appearing by Miller, Mack & Fairchild, by Gilbert Hardgrove, their attorneys, and the defendant,

Thomas E. Fairchild appearing in proper person, and the court having on the 14th day of June, 1930, filed its Findings of Fact, Conclusions of Law and Directions for Judgment,

Now upon all the proceedings herein, It is

Adjudged and decreed that the above entitled action be and the same is hereby dismissed.

Dated June 14, 1950.

By the Court:

F. RYAN DUFFY,
U. S. Circuit Judge.
PATRICK T. STONE,
U. S. District Judge.
ROBERT E. TEHAN,
U. S. District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

Subchapter III, Chapter 111
Wisconsin Statutes

PUBLIC UTILITIES

111.50. Declaration of policy * * *

111.51. Definitions * * *

111.52. Settlement of labor disputes through collective bargaining and arbitration. It shall be the duty of Public utility employers and their employes in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate. (1947 c. 414)

111.53 Appointment of conciliators and arbitrators. Within 30 days after July 25, 1947, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing, in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems.

* * * * * * *

111.54 Conciliation. If in any case of a labor dispute between a public utility employer and its employes, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employes are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute. (1947 c. 414)

111.55 Conciliator unable to effect settlement; appointment of arbitrators. If the conciliator so named is unable to effect a settlement of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the Board as the arbitrator

(or arbitrators) to hear and determine such dispute. (1947 c. 414)

111.56. Status quo to be maintained. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other. (1947 c. 414)

111.57. Arbitrator to hold hearings * * *

111.58. Standards for arbitration * * *

111.59. Award filed with Clerk of circuit court * * *

111.60. Judicial review of order * * *

111.61. Board to establish rules * * *

111.62. Strikes, work stoppages, slowdowns, lockouts, unlawful; penalty. It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown, which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employees when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor. (1947 c. 414)

111.63. Enforcement. The Board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply. (1947 c. 414)

111.64 Construction. (a) Nothing in this subchapter shall be contrued to require any individual employe to render labor or service without his consent, or to make illegal

the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have the power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith, are to the extent of such conflict concerning the subject matter, dealt with in this subchapter, supplanted by the provisions of this subchapter. (1947 c. 414)

Labor-Management Relations Act 1947

(61 Stats. 136, 29 U.S.C.A. Supp. Sec. 141 *et seq.*)

(Pertinent Parts)

Title I

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in

the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions, and by restoring equality of bargaining power between employers and employees.

* * * *

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * *

Sec. 8 (a) It shall be an unfair labor practice for an employer . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provision of section 9 (a).

* * * *

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents . . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

• • • •

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as to either interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Sec. 14 (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law.

• • • •

Title II

Sec. 201. That it is the policy of the United States that

. . .

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 302

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, ET AL, ETC.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON and HENRY C. RULE, Individually, etc.

Appellees.

On Appeal From the District Court for the Eastern District of Wisconsin

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BRIEF FOR APPELLANTS

MAX RASKIN,
Counsel for Appellants.

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BRIEF FOR APPELLANTS

Opinion Below

The opinion of the District Court for the Eastern District of Wisconsin is reported in 90 Fed. Supp. 347, and may be found on page 91 of the original record, 59 of the printed record; dissenting opinion, page 99 of the original record and 67 of the printed record.

Jurisdiction

The judgment of the District Court was entered on June 14, 1950. The order of District Judge Robert E. Tehan allowing this appeal was entered August 8, 1950. The order of this court noting probable jurisdiction was entered on October 23, 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 of the United States Code, Sections 1253 and 2281.

Statutes Involved

Subchapter III of Chapter 111, Wisconsin Statutes, 1947, Sections 111.50 to 111.64, inclusive, and the Labor-Management Relations Act, 1947 (61 Stats. 136; 29 U.S.C. S.Sec. 141), material parts of which statutes are set out in full in Appendix A to this Brief.

For the convenience of the court a summary of the Wisconsin Statutes is presented here.

Section 111.53 provides for the appointment by the Wisconsin Employment Relations Board of a panel of conciliators and arbitrators.

Section 111.54 provides that if a labor dispute between a Public Utility and its employees reaches a stalemate, either party may petition the Board to appoint a conciliator to attempt to settle the dispute.

Section 111.55 provides that if within 15 days after his appointment the conciliator is unable to settle the dispute, he must report that fact to the Board. If the Board believes that a continuation of the dispute will cause or is

likely to cause the interruption of an essential service, it shall submit the names of either 3 or 5 persons from the panel provided for in Sec. 111.53. Each party shall strike one name from such list and the person or persons left on the list shall be appointed by the Board as the arbitrator to hear and determine such dispute.

Section 111.56 provides that the *status quo* be maintained.

Section 111.62 makes it a criminal offense for public utility employees, acting in concert, to call a strike or go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service.

It also makes it a criminal offense for any person to instigate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lock-out, or slowdown, or work stoppage which would cause an interruption of an essential service.

Section 111.63 provides for enforcement by the Board, including the rights to apply for injunction, to restrain violation or to compel performance.

Section 111.64 provides that the subchapter shall not be construed to require any individual employee to render labor or service without his consent, or make it illegal to quit or withdraw from his place of employment unless done in concert with others, and no process shall issue to compel an individual to render service or remain at his employment without his consent.

Questions Presented

Is a judgment of the Circuit Court of Milwaukee County, affirmed by the Supreme Court of Wisconsin, dismissing a complaint on a general demurrer, *res judicata* in a new

action between the same parties in the United States District Court, based on a complaint containing sixteen allegations of material fact, which were not in the complaint in the State case?

Does subchapter III of Chapter 111, Wisconsin Statutes, 1947, violate the 13th and 14th Amendments to the Constitution of the United States?

Is subchapter III of Chapter 111 in conflict with the Labor-Management Relations Act of 1947?

Statement

This is an action to restrain the enforcement of a statute of the State of Wisconsin, on the ground that it violates the 13th and 14th Amendments to the United States Constitution and also is in conflict with the Federal Labor-Management Relations Act of 1947.

The District Court for the Eastern District of Wisconsin declined to pass on the merits of the case and dismissed the complaint, holding that a judgment in a previous action between the same parties in a state court was *res judicata,* one judge dissenting.

The judgment of the state court was entered by the Circuit Court of Milwaukee County on the 6th day of January, 1949.

That was an action for Declaratory relief. The defendants demurred to the complaint on the grounds that the complaint did not state facts sufficient to constitute a cause of action. The Circuit Court sustained the demurrers and the Supreme Court of Wisconsin affirmed the decision

of the Circuit Court; *United G. C. & C. Workers of America, Local 18, C. I. O., et al., v. Wisconsin Employment Relations Board, et al*, 255 Wis. 154-163, 38 N. W. (2d) 692-697.

A copy of the complaint and judgment of the Circuit Court was received in evidence as an exhibit and is part of the record transmitted to this court (R. 25-30).

The instant case was commenced October 4, 1949. On October 5, 1949, the employees of the defendant, Milwaukee Gas Light Company, went out on strike.

On October 5th, after the strike was called, the defendant, Wisconsin Employment Relations Board, secured an order from the Circuit Court of Milwaukee County, restraining picketing, and ordering the union and its officers to take immediate steps to notify all employees to resume work forthwith.

On October 6, 1949, the union and the defendant company agreed on wages, hours and other conditions of employment but did not agree on the pension plan which was one of the principal issues in dispute.

The strike was called off and the employees returned to work on October 6, 1949.

On October 10, 1949, the defendant, Wisconsin Employment Relations Board, secured an order from the Circuit Court of Milwaukee County, commanding the appellant union and certain of its members to show cause why they should not be punished for contempt for violating the order of October 5th.

These developments necessitated the filing of an amended complaint which was filed October 18, 1949.

This amended complaint contained 16 allegations of material fact which did not appear in the complaint acted

on by the Circuit Court of Milwaukee County, or the Supreme Court of Wisconsin.

These allegations are set out in paragraphs 20, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 37, 38 and 39 of the amended complaint (R. 1).

This was the complaint to which all of the defendants answered and is the complaint involved herein.

The issues raised by the pleadings were resolved and set out in a Stipulation of Facts filed in and received by the District Court (R. 34).

The material allegations referred to above were admitted to be true and appear in the Stipulation in paragraphs 17, 19, 20, 22, 25, 26, 27, 30, 31, 32, 33 and 34 (R. 34).

These allegations will be set out later in this Brief, for the purpose of comparison with the complaint in the case in the Circuit Court of Milwaukee County.

Specification of Errors To Be Urged

The District Court erred:

(1) In holding that a judgment of a state court based on a general demurrer was *res judicata* as to a new action, between the same parties, on a wholly different complaint, precluded a United States District Court from inquiring into the merits.

(2) In holding that the construction of a state statute by the court of last resort precluded the district court from inquiring into the effect of that construction upon the laws of the United States.

(3) In holding that a judgment of a state court, declaring rights and status, based on a complaint that did not state a cause of action, was binding on the United States District Court.

Argument

I.

Can a judgment declaring rights and status be entered on a complaint which does not state a cause of action?

We are met at the outset by this query.

While this is not the principal contention of the appellants we believe it should be determined before considering the other contentions of the parties.

If, as we believe, the entry of a judgment declaring rights and status on a complaint that does not state a cause of action is erroneous, *ab initio,* it cannot be *res judicata* precluding a United States Court from inquiry.

If the complaint does not state a cause of action, there can be no actual or *bona fide* justiciable controversy such as is necessary to sustain a judgment for Declaratory relief.

When the Circuit Court of Milwaukee County, in the case of *United Gas, Coke & C. Workers, et al, v. W. E. R. B.,* 255 Wis. 154, sustained a general demurrer to the complaint it said, in effect, that there was no controversy.

The Wisconsin Supreme Court has held, in *Miller v. Currie,* 208 Wis. 199, 204:

* * * * *

'(2) There must be an actual and *bona fide* controversy as to which the judgment will be *res judicata.* Such a case requires that all the interested parties shall be before the court.' "

and in *Heller v. Shapiro*, 208 Wis. 310, 316:

> "But it should be called to the attention of the profession that the courts will not, under the statute, act in a mere advisory capacity or take cognizance of questions that may never arise or permit resort to the statute until an actual controversy has arisen under an existing state of facts, and we consider that this may most forcibly be done by ignoring the questions the trial court attempted to settle by its declaratory judgment."

At the same time that the *United Gas Workers* case, *supra*, was heard, and determined, a companion case, *Amalgamated Ass'n of Street, Electric, Railway & Coach Employees of America, Division 998, et al, v. Milwaukee Electric Railway & Transport Co.*, 255 Wis. 163, was heard and determined.

In that case, the separate defendants answered. The plaintiffs demurred to the answers. The Circuit Court of Milwaukee County overruled the demurrers, and entered judgment declaring rights and status.

The judgments entered in each case were exactly the same, but the Supreme Court of Wisconsin reversed the Circuit Court of Milwaukee County in the *Amalgamated Ass'n case*, stating:

> "This case was argued and submitted with the case of *United G., C. & C. Workers v. Wisconsin E. R. Board*, ante, p. 154, 38 N. W. (2d) 692, before the trial court and before this court.
>
> Following the argument and submission of this case below, the trial court filed a decision overruling the demurrers to the separate answers of the defendants, but directed that judgments might be entered declaring the rights and status of the parties. When the demurrers were overruled, the burden of proceeding with the case was upon the plaintiffs. The plaintiffs

elected to produce no evidence and upon that election the trial court should have entered an order dismissing the complaint. For that reason the judgment entered must be reversed.

By the Court—Judgment reversed and cause remanded with directions to enter an order dismissing the plaintiffs' complaint."

We respectfully submit that if the judgment in one case was erroneous, then the judgment in the companion case was erroneous.

The decision in the *Amalgamated Ass'n* case merely followed the long settled law of Wisconsin.

As the District Court based its decision of *res judicata* on what we believe to be an erroneous judgment, under Wisconsin law, we will, in the hope of aiding the court, cite and quote from a few Wisconsin Supreme Court decisions, which set out the Wisconsin rule.

Gentilli v. Brennan, 202 Wis. 465, 470 (1930):

"Furthermore, such inquiries as these papers are directed to, have no place in this case, upon the state of the record. Defendants demurred to the plaintiff's complaint, and the sole question before the court is whether the complaint upon its face stated a cause of action in favor of the plaintiff."

Trathen v. Lyon, 224 Wis. 446, 449 (1937):

"As was pointed out in *Gentilli v. Brennan,* 202 Wis. 465, 233 N. W. 98, the sole question upon demurrer is whether the facts alleged in the pleading to which the demurrer is directed are sufficient to constitute a cause of action or defense. This statement is reiterated for the reason that the briefs set forth matters of fact not contained in the pleadings, and because the trial court made and entered findings of fact and conclusions of law in disposing of the demurrer. All of these procedures are irrelevant and irregular."

Chas. H. Stehling Co. v. Milcor Steel Co. 242 Wis. 629, 631 (1943):

> "'After a demurrer has been sustained, the effect is to hold for naught the declaration or complaint.' 41 Am. Jur. p. 468, sec. 249, Pleading. The fact that the order recites that the demurrer is overruled on the other grounds specified therein does not determine the law of the case after the service of an amended complaint. It may be an advance notice to the defendant of what the decision of the court will be in the event a demurrer is interposed to the amended complaint upon the grounds alleged, but in no way will it make the questions *res judicata.* An order sustaining a demurrer to a complaint is of no effect as determining the law of the case after the service of an amended complaint."

United States F. & G. Co. v. Pullen, 230 Wis. 137, 141 (1939):

> "The trial court concluded, in passing upon the demurrer to the amended complaint, that because no appeal was taken from the order sustaining a demurrer to the original complaint, the court's ruling in sustaining the latter demurrer constituted the law of the case excepting in so far as the amendment supplied allegations which were lacking in the original complaint, and which are necessary to set forth a cause of action. That conclusion was erroneous. The practice is well settled that 'an order of the trial court sustaining a demurrer to a pleading is not *res adjudicata* upon the same questions raised upon a second demurrer.' *Rogers v. John Week Lumber Co.,* 117 Wis. 5, 8, 93 N. W. 821; *Schoenleber v. Burkhardt,* 94 Wis. 575, 69 N. W. 343; *Watson v. Appleton,* 62 Wis. 267, 22 N. W. 475; *Hackett v. Carter,* 38 Wis. 394."

We respectfully submit that the judgment of the Circuit Court of Milwaukee County was erroneous *ab initio* and could not be *res judicata* to the new action in the District Court.

II.

The amended complaint raises issues not adjudicated by Wisconsin courts.

The District Court's Conclusions of Law 4 and 5 read (R. 82):

> "4. The causes of action in both actions being the same and the parties being identical or in privity, the judgment of the circuit court of Milwaukee county was affirmed by the Supreme Court of Wisconsin is *res adjudicata* and conclusive of the parties not only as to all the issues pertaining to the constitutionality of the statute as applied to the plaintiffs that might have been raised.
>
> 5. The declaratory judgment of the circuit court of Milwaukee county, as affirmed by the Supreme Court of Wisconsin introduced into the record in this case, is *res adjudicata* as to all the issues sought to be raised in this action and consequently bars the maintenance of this action."

In the amended complaint (R. 1) and the Stipulation (R. 34) there are ten allegations of fact that could not possibly be raised in the Circuit Court action. These ten allegations refer to overt acts occurring nine months after the Circuit Court action was decided.

Summarized from the Stipulation these ten overt acts are as follows:

Par. 19. The union terminated its contract with the company on June 1, 1949 by written notice as required by the Labor-Management Relations Act of 1947. (R. 38)

Par. 20. The Federal Mediation and Conciliation Service intervened and assisted in the negotiations of a contract for 1949-1950. (R. 38)

Par. 22. September 19, 1949, the union filed a charge of unfair labor practice by the Gas Co. for refusal to bargain collectively. (R. 38)

Par. 25. On September 28, 1949, the defendant company petitioned the defendant, Wisconsin Employment Relations Board, to appoint a conciliator. (R. 39)

Par. 26. On October 3, 1949, the defendant, Wisconsin Employment Relations Board, issued an order directing the plaintiffs to strike the name of one person from a list of proposed arbitrators. (R. 39)

Par. 30. On October 5, 1949, the employees of the defendant company went out on strike. (R. 42)

Par. 31. On October 6, 1949, the defendant Wisconsin Employment Relations Board secured an order from the Circuit Court of Milwaukee County restraining appellants from going out on strike, from engaging in picketing and directed that immediate steps be taken to notify all employees to return to work immediately. (R. 42)

Par. 32. That the Attorney General would, if any violation occurred, enforce subchapter III of Chapter 111. (R. 43)

Par. 33. On October 6, 1949, the union and the company agreed on wages, hours, and other conditions of employment, but did not agree on a pension plan which was one of the principal issues of the strike. That if an impasse or stalemate arose as to this issue the company would request compulsory arbitration. (R. 43)

Par. 34. That if such impasse or stalemate occurred, the defendant Wisconsin Employment Relations Board would enforce subchapter III of Chapter 111. (R. 43)

As to these ten issues the Circuit Court judgment could not possibly be *res judicata*.

The Circuit Court itself realized that its judgment was restricted to the particular facts before it, stating in its opinion (R. 55):

> "In the briefs of counsel for plaintiff and upon the oral argument, certain hypothetical situations were propounded, in which it was claimed that Chapter 414, especially Sec. 111.62, would operate oppressively. The claimed inequalities will be adjudicated when actual cases arise which require a decision upon the points raised. *Wisconsin Telephone Co. v. Wisconsin E. R. B.* —Wis.—(decided Nov. 16, 1948); *Democrat Printing Co. v. Zimmerman*, 245 Wis. 406. The invalidity of Sec. 111.62, or any part thereof, would not invalidate the Act as a whole."

The Supreme Court of Wisconsin also recognized this restriction. In its opinion affirming the Circuit Court, *United G. C. & C. Workers v. WERB*, 255 Wis. 154, the Supreme Court says at page 158:

> "We are first confronted with a fundamental rule of law that the constitutionality of a statute is not to be determined as a hypothetical question or upon assumed facts or unreal possibilities. The court should not anticipate a question of constitutional law before it is to be applied to the precise facts before it and should not attempt to test the operation of a law under every conceivable set of circumstances."

and on page 161:

> "Upon the record here there is no question of the delegation of judicial power. This question and other contentions and arguments of the plaintiffs can be disposed of best when a case involving a particular question is presented and fully argued. If any person

> or agency, in the enforcement of the law, should attempt to usurp unlawful legislative or judicial powers there is an adequate remedy."

The contingencies referred to in both opinions have happened, and are present in the case at bar.

While the last sentence in the quotation from the Circuit Court opinion "The invalidity of Sec. 111.62, or any part thereof, would not invalidate the Act as a whole" is perhaps *dicta*, it indicates that the Court had some doubt as to its validity.

III.

Conflict With Federal Law

The District Court held that the judgment of the Circuit Court of Milwaukee County affirmed by the Wisconsin Supreme Court *(United G. C. & C. Workers v. WERB*, 255 Wis. 154) precluded it from deciding the issues in the instant case.

The Circuit Court of Milwaukee County held that subchapter III, Chapter 111, Wisconsin Statutes, was not in conflict with the Federal Labor-Management Relations Act.

That finding was made on the allegations in the complaint in the Circuit Court case. In its opinion (R. 48) the court gives its reasons for so holding (R. 57):

> "The allegations of the amended complaint in the Gas Company case merely allege that the defendant company is engaged in Interstate Commerce and is therefore subject to the National Act.
>
> * * * * *
>
> "The Wisconsin Supreme Court has uniformly held that until and unless the National Labor Relations

> Board takes jurisdiction over a particular controversy, Congress intended to leave within the reserved power of the state the right to deal with such controversies."

There being no allegation in the complaint that the National Labor Relations Board had taken jurisdiction of the labor relations between the employees and the defendant Gas Company, the Circuit Court could not and did not consider that issue.

The court concedes in its opinion (quote supra) that if the National Labor Relations Board had taken jurisdiction the State Board could not.

In the amended complaint in the instant case there are five allegations of fact, which appellants contend prove that the National Labor Relations Board had taken jurisdiction over all the labor relations of the Gas Company and its employees, and intervened in the particular dispute which resulted in the strike.

These facts appear in the Stipulation as follows:

> "28 (c) That on June 24, 1943, an order was entered by the National Labor Relations Board directing an election for the purpose of determining the representative of the employees of the company for collective bargaining (National Labor Relations Board Case No. R-5398). This order was (fol. 66) amended by order of the National Labor Relations Board, dated July 8, 1943, for the purpose of further defining the unit. A supplemental decision and certification of the National Labor Relations Board in this case was entered on October 5, 1943, certifying United Gas, Coke and Chemical Workers of America (CIO) as the representative of the employees of the company in the unit (R. 41).
>
> An order dated October 30, 1946, was entered by the National Labor Relations Board directing an election

with respect to employees of the company in a unit comprised of supervisory employees (National Labor Relations Board Case No. 13-R-3037). At the election conducted pursuant to this order less than a majority of the employees of the unit voted to be represented by a union (R. 41)."

"19. That the most recent of such contracts was entered into between the plaintiff union and the defendant company on September 24, 1948, which by its terms remained in full force and effect until June 1, 1949, and from year to year thereafter unless terminated by written notice on or before April 1st, of any year; that the plaintiff union terminated said agreement as of June 1, 1949, by written notice (fol. 63) to the defendant company prior to April 1, 1949, as required by Section 8 (d) of the Labor-Management Relations Act of 1947 (R. 38).

"20. That the Federal Mediation and Conciliation Service, acting under the Notice of Termination of Contract, copy of which was submitted to it, intervened and proceeded to assist in the negotiation of a contract for the year 1949-50 (R. 38).

"22. That on September 19, 1939, the plaintiff union filed a petition with the National Labor Relations Board, charging the defendant company with having violated Section 8 (a) (5) of the Labor-Management Relations Act of 1947, in that it was guilty of an unfair labor practice for having failed and refused to bargain collectively with the plaintiff union, the duly authorized bargaining representative of the majority of the employees in the bargaining unit, and that such petition is now pending before the National Labor Relations Board (R. 38)."

We respectfully submit that these facts raise the contention that the National Labor Relations Board had already taken jurisdiction. If this contention were resolved in appellants' favor, it would, in the Circuit Court's own language (quote supra), prevent the State Board from acting.

That contention had never been before any Wisconsin court. It was made in the District Court action as an entirely new issue for adjudication.

If the contention that the National Labor Relations Board had assumed jurisdiction was decided by the District Court in favor of appellants, a judgment granting all the relief prayed for could be and, as we believe, should be entered.

Conclusion

We respectfully submit (a) that the judgment of the Circuit Court of Milwaukee County upon which the District Court relied was erroneous *ab initio;* (b) that the opinions of the Wisconsin Circuit and Supreme Courts conclusively restrict the judgment to the facts in the record before them; (c) that the complaint in the District Court raises issues that were not adjudicated by the Wisconsin Courts; (d) that the District Court should have adjudicated the contention that the Wisconsin Statute violates the Thirteenth and Fourteenth Amendments of the United States Constitution, and is in conflict with the laws of the United States.

The judgment of the District Court for the Eastern District of Wisconsin should be reversed.

Respectfully submitted,

MAX RASKIN,

Attorney for Appellants.

APPENDIX "A"

Subchapter III, Chapter 111
Wisconsin Statutes

Public Utilities

111.50 Declaration of policy * * * * *

111.51 Definitions * * * * *

111.52 Settlement of labor disputes through collective bargaining and arbitration. It shall be the duty of public utility employers and their employes in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate. (1947 c. 414)

111.53 Appointment of conciliators and arbitrators. Within 30 days after July 25, 1947, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing, in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. . . .

111.54 Conciliation. If, in any case of a labor dispute between a public utility employer and its employes, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employes are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if, in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall ap-

point a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute. (1947 c. 414)

111.55 Conciliator unable to effect settlement; appointment of arbitrators. If the conciliator so named is unable to effect a settlement of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute. (1947 c. 414)

111.56 Status quo to be maintained. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other. (1947 c. 414)

111.57 Arbitrator to hold hearings * * * *

111.58 Standards for arbitration * * * *

111.59 Award filed with Clerk of circuit court * * * *

111.60 Judicial review of order * * * *

111.61 Board to establish rules * * * *

111.62 Strikes, work stoppages, slowdowns, lockouts, unlawful; penalty. It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown, which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employes when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage any other

person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor. (1947 c. 414)

111.63 Enforcement. The Board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply. (1947 c. 414)

111.64 Construction. (a) Nothing in this subchapter shall be construed to require any individual employe to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith are, to the extent of such conflict concerning the subject matter, dealt with in this subchapter, supplanted by the provisions of this subchapter. (1947 c. 414)

LABOR-MANAGEMENT RELATIONS ACT

1947

(61 Stats. 136, 29 U.S.C.A. Supp.
Sec. 141 *etc. seq)*

(Pertinent Parts)

TITLE I.

Section 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes aris-

ing out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

• • • •

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

• • • •

Sec. 8 (a) It shall be an unfair labor practice for an employer . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provision of section 9 (a).

• • • •

Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents . . .

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees, subject to the provisions of section 9 (a);

• • • •

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as to either interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

Sec. 14 (b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a

condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law.

• • • •

TITLE II.

Sec. 201. That it is the policy of the United States that . . .

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

• • • • •

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 302

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, ET AL. ETC.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON AND HENRY C. RULE, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION

THOMAS E. FAIRCHILD,
Attorney General of Wisconsin,
STEWART G. HONECK,
Deputy Attorney General,
BEATRICE LAMPERT,
Assistant Attorney General,
Counsel for Appellees, Wisconsin Employment Relations Board, L. E. Gooding, J. E. Fitzgibbon, and Henry C. Rule, and Thomas E. Fairchild.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, INDIVIDUALLY AND AS OFFICERS OF LOCAL 18 UNITED GAS COKE AND CHEMICAL WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATION, AND LOCAL 18, UNITED GAS COKE AND CHEMICAL WORKERS OF AMERICA, (CIO),

Plaintiffs,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON AND HENRY C. RULE, INDIVIDUALLY AND AS COMMISSIONERS CONSTITUTING THE WISCONSIN EMPLOYMENT RELATIONS BOARD, AND THOMAS E. FAIRCHILD, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, AND THE MILWAUKEE GAS LIGHT COMPANY, A WISCONSIN CORPORATION,

Defendants

ALTERNATIVE MOTION TO DISMISS OR AFFIRM

Now come the appellees, Wisconsin Employment Relations Board, L. E. Gooding, J. E. Fitzgibbon, Henry C.

Rule and Thomas E. Fairchild, and respectfully move the Supreme Court of the United States, in the alternative:

1. To dismiss the appeal in the above entitled cause, for lack of jurisdiction, or if such motion be denied

2. To affirm the judgment of the District Court of the United States for the Eastern District of Wisconsin dismissing the action in the above entitled cause, on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The motion of the appellees is made pursuant to Rule 12, paragraph 3 of the Rules of the Supreme Court of the United States. It is based upon facts set forth in the record transmitted upon appeal and summarized in the statement as to jurisdiction filed herewith on behalf of the above named appellees.

THOMAS E. FAIRCHILD,
Attorney General, State of Wisconsin,
STEWART G. HONECK,
Deputy Attorney General,
BEATRICE LAMPERT,
Assistant Attorney General,
Attorneys for Appellees, Wisconsin Employment Relations Board, L. E. Gooding, J. E. Fitzgibbon and Henry C. Rule, and Thomas E. Fairchild.

P. O. Address: State Capitol, Madison 2, Wisconsin.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, INDIVIDUALLY AND AS OFFICERS OF LOCAL 18 UNITED GAS COKE AND CHEMICAL WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATION, AND LOCAL 18, UNITED GAS COKE AND CHEMICAL WORKERS OF AMERICA, (CIO),

Plaintiffs,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON AND HENRY C. RULE, INDIVIDUALLY AND AS COMMISSIONERS CONSTITUTING THE WISCONSIN EMPLOYMENT RELATIONS BOARD, AND THOMAS E. FAIRCHILD, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, AND THE MILWAUKEE GAS LIGHT COMPANY, A WISCONSIN CORPORATION,

Defendants

STATEMENT AS TO JURISDICTION BY THE APPELLEES WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON, HENRY C. RULE AND THOMAS E. FAIRCHILD.

In compliance with Rule 12, Paragraph 3 of the Rules of the Supreme Court of the United States, the appellees,

Wisconsin Employment Relations Board, L. E. Gooding, J. E. Fitzgibbon, Henry C. Rule and Thomas E. Fairchild submit herewith a statement disclosing matter and ground making against the jurisdiction of the District Court of the United States for the Eastern District of Wisconsin to allow appeal directly to the Supreme Court of the United States; and in support of the motion of the above named appellees to dismiss said appeal or to affirm the judgment of said District Court dismissing the action.

I

Facts on Which the Motion of the Above Appellees is Based, and upon Which Jurisdiction Is Opposed

All of the facts herein set forth are undisputed, and are shown in the findings of the District Court based upon the pleadings and the stipulation of the parties.

The action, commenced by the appellants in the District Court for the Eastern District of Wisconsin, sought judgment restraining the enforcement of Subch. III of Ch. 111 of the statutes of Wisconsin for 1947, on the ground of unconstitutionality. A court of three judges was convened to hear the matter, but it did not consider the validity of the state statutes. The District Court did not either grant or deny the injunction sought, but instead dismissed the action on the sole ground that the issues were *res adjudicata.*

In September, 1948, the appellant Local 18 and its president, Thomas Lansing (both appellants in the above entitled cause), brought an action in Circuit Court for Milwaukee County in their own behalf and on behalf of all employees of the Milwaukee Gas Light Company, against the Wisconsin Employment Relations Board and the Milwaukee Gas Light Company (both appellees in the above entitled cause) praying the court to declare Subch. III of Ch. 111

of the Statutes of Wisconsin for 1947 unconstitutional, and to give such further relief by way of declaration of the rights of the parties as might be lawful, just and proper. As a result of such action the Circuit Court of Milwaukee County entered the following judgment on January 6, 1949:

> "It Is Hereby Adjudged and determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947, and does not deny to the plaintiffs, nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, and does not deprive them of, any rights, privileges or protection secured to them under either of said constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947.
>
> "It Is Further Adjudged that the prayer of the plaintiffs in the above entitled action for further relief be and the same hereby is denied."

Appeal was taken from such judgment to the Supreme Court of Wisconsin, which affirmed the judgment on July 12, 1949, without modification. No review of the action of the state court by the United States Supreme Court was sought.

II

The Judgment of the Wisconsin Court Was Res Adjudicata With Respect to the Issues Sought to Be Raised in This Proceeding.

The doctrine of *res adjudicata* is briefly summarized in *Grubb* v. *Public Utilities Comm.*, (1930) 281 U. S. 470, 479, 50 S. Ct. 374, 74 L. ed. 972:[1]

> "* * * a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted but also as respects any other available matter which might have been presented to that end. * * *"

---

[1] By the full faith and credit clause of the Federal Constitution which has been made applicable by Congress to federal courts, by sec. 28 U.S.C. sec. 1738 (1948) and the earlier laws from which it was derived, it has regularly been held by federal courts that the judgment of a state court is *res adjudicata* and bars a subsequent action in federal court.

Angel v. *Bullington*, (1947) 330 U. S. 183, 67 S. Ct. 657, 91 L. ed. 832;
Treinies v. *Sunshine Mining Co.*, (1939) 308 U. S. 66, 60 S. Ct. 44, 84 L. ed. 85, rehearing denied, 309 U. S. 693, 60 S. Ct. 464, 84 L. ed. 1034;
American Surety Co. v. *Baldwin*, (1932) 287 U. S. 156, 53 S. Ct. 98, 77 L. ed. 231;
Grubb v. *Public Utilities Commission of Ohio*, (1930) 281 U. S. 470, 50 S. Ct. 374, 74 L. ed. 972;
Lyon v. *Perin & Gaff Mfg. Co.*, (1888) 125 U. S. 698, 8 S. Ct. 1024, 31 L. ed. 839.

That is true even though federal questions were decided in the state court. *Angel* v. *Bullington*, (1947) 330 U. S. 183, 67 S. Ct. 657, 91 L. ed. 832; *Grubb* v. *Public Utilities Commission*, (1930) 281 U. S. 470, 50 S. Ct. 374, 74 L. ed. 972; *Mitchell* v. *First National Bank of Chicago*, (1901) 180 U. S. 471, 21 S. Ct. 421, 45 L. ed. 627; *Sperry & Hutchinson Co.* v. *City of Tacoma, Wash.*, (D. C. Wash. 1912) 199 F. 853; *Straus* v. *American Publishers Association et al.*, (C.C.A. N.Y. 1912) 201 F. 306, 119 C.C.A. 544, error dismissed (1914) 235 U. S. 716, 35 S. Ct. 197, 59 L ed. 438; *Bank of Kentucky* v. *Stone et al.*, (C.C. Ky. (1898) 88 Fed. 383, affirmed 174 U. S. 799.

The elements necessary to invoke the application of the doctrine of *res adjudicata* are all shown by the record on appeal to be present in this case.

(1) *The subject matter of this action is the same as that involved in the state court judgment, affirmed by the state supreme court, from which no appeal was taken.*

The cause of action in this case, and in the case decided in the state courts, rests wholly upon the asserted invalidity of the substantive provisions of Subch. III of Ch. 111 of the statutes of Wisconsin, 1947, in their application to the appellants. The asserted invalidity in both actions was based on repugnancy to the Constitution and to the Labor Management Relations Act of 1947. If the substantive provisions of the law are valid as applied to these appellants, the basic cause of action fails in either case.

The action before the state court asked that Subch. III of Ch. 111 of the Statutes of Wisconsin for 1947 be declared unconstitutional and invalid and for such further relief by way of declaration of the rights of parties as might be lawful, just and proper. The prayer of the complaint brought before the District Court of the Eastern District of Wisconsin asked that the court issue a judgment declaring "the provisions of Subch. III of Ch. 111 of the Wisconsin Statutes of 1947, insofar as they may be applied to penalize these plaintiffs and others for whom they are authorized to act * * * are void, illegal, unenforcible and repugnant to the United States Labor Management Relations Act of 1947 and to the Constitution of the United States" and for further relief as might be just and equitable.

Both actions were anticipatory to the extent that no application of the law was alleged to have resulted in actual damage, nor was there any allegation in either case that the

law had been so applied by reason of faulty procedure or arbitrary decision as to cause special damage.

The allegations involved in the action commenced before the Eastern District of Wisconsin did not differ in substance from those summarized in the opinion of the Supreme Court of the State of Wisconsin in *United G., C. & C. Workers* v. *Wis. E. R. Board,* (1948) 255 Wis. 145, 156-157; and the relief in either case could have been based on no issue other than the substantive invalidity of the Wisconin Statutes.

Even the remedy sought in the two cases was almost identical, although that would be immaterial on the issue of *res adjudicata.* The rules are summarized in Am. Jur. and C. J. S. as follows:

> " * * * If the causes of action are substantially the same, a difference in the relief sought will not prevent the judgment in the state court from operating as an estoppel in the federal court. * * * " (50 C. J. S. 521)

> " * * * On the other hand, the fact that a different form or measure of relief is asked does not preclude the application of the judgment to estop the maintenance of the second action." (30 Am. Jur. 919)

(2) The judgment of the state court was final

The Supreme Court of the State of Wisconsin, which is the court of last resort in the state, affirmed without modification the judgment hereinbefore quoted. The affirmation by the Supreme Court had the effect under Wisconsin law of making the judgment of the Circuit Court the judgment of the Supreme Court. See *Ean* v. *The Chicago, Milwaukee & St. Paul R. Co.,* (1898) 101 Wis. 166, 170-171, 76 N. W. 329 in which it was stated that the judgment entered by the trial court is upon affirmation "in legal effect, the judgment of this court." The effect of the Supreme Court affirmance was there stated to render the judgment *res adjudicata* as

to all matters upon which the trial court passed as well as on those discussed by the Supreme Court. The court said:

> "• • • It may be stated as elementary that the judgment is conclusive upon every matter upon which the court did actually pass, or upon which it might have passed, in making its decision. The objection to the complaint was that it did not state a cause of action. That covered every ground that could be urged against it, and the decision thereon is conclusive, although the court below may have considered one ground and this court another."

The foregoing summarizes the law of the state, which the appellants must have been presumed to know when they had resort to state courts.

The appellants took no appeal from the judgment, although there can be no question that the judgment was appealable under the rule of *Railway Mail Assn.* v. *Corsi,* (1944) 326 U. S. 88, 65 S. Ct. 1483, 89 L. Ed. 2072.

(3) The Adjudication of the Wisconsin Supreme Court was on the merits.

The summation of the doctrine of *res adjudicata* set out in the *Grubb case, supra,* indicated that a judgment in order to be *res adjudicata* must be one on the merits. In affirming the judgment of the Milwaukee County Circuit Court the Wisconsin Supreme Court necessarily passed not only upon the merits of all the issues expressly discussed by it as well as those presented to the Circuit Court and covered by its judgment. This is inescapable even though it is true that the opinion filed in the supreme court of Wisconsin did not discuss the grounds upon which the appellants claimed the statute was invalid. As pointed out in the case of *Ean* v. *The Chicago, Milwaukee & St. Paul R. Co., supra,* the judg-

ment of the Circuit Court became that of the Supreme Court upon affirmation.

The judgment was no less one upon the merits because it was entered upon general demurrer than it would have been if it had been entered after trial. The only difference between a judgment upon demurrer and one after trial is that upon demurrer the facts pleaded are admitted instead of proven. In arriving at its judgment, the court considers all the facts pleaded by the plaintiff and could have no other facts before it had the issues gone to trial.

It is possible that a demurrer on limited grounds such as defect of parties might not give rise to the defense of *res adjudicata;* but a general demurrer on the basis of the objection that the complaint does not state a cause of action admits all factual allegations and raises all the issues that could be raised in a trial. That is the law of Wisconsin as was laid down in the case of *Ean* v. *The Chicago, Milwaukee & St. Paul R. Co., supra,* above quoted, in which the judgment pleaded as *res adjudicata* was entered upon a demurrer *ore tenus.*

It is well established by decisions of the United States Supreme Court that a judgment sustaining a demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action *is an adjudication upon the merits* and may be pleaded in bar of another suit on the same facts. The judgment is conclusive not only of the matters actually adjudicated but also of any others which could have been determined at that time.

In *Northern Pacific Railway* v. *Slaght,* (1907) 205 U. S. 122, 130, 27 S. Ct. 442, 51 L. Ed. 738, the court said:

> " * * * It is well established that a judgment on demurrer is as conclusive as one rendered upon proof.

Gould v. *Evansville & Crawfordsville R. R. Co.*, 91 U. S. 526; *Bissel* v. *Spring Valley Township*, 124 U. S. 228; Freeman on Judgments, section 267. • • •"

See, also:

Bissell v. *Spring Valley Township*, (1888) 124 U. S. 225, 8 S. Ct. 495, 31 L. Ed. 411;

Gould v. *Evansville and Crawfordsville R. R. Co.*, (1875) 91 U. S. 526, 23 L. Ed. 416;

Aurora City v. *West*, (1868) 74 U. S. 82, 7 Wall. 82, 19 L. Ed. 42;

Ellis v. *The Northern Pacific R. Co.*, (1891) 80 Wis. 459, 50 N. W. 397;

Lewko v. *Chas. A. Krause Milling Co.* (1935), 219 Wis. 6, 261 N. W. 672.

(4) The parties here were parties or privies in the action in the Wisconsin courts

Local 18 of the United Gas, Coke and Chemical Workers of America and Thomas Lansing (appellants here) were parties plaintiff in the action before the Wisconsin court, and the Milwaukee Gas Light Company and Wisconsin Employment Relations Board (appellees here) were parties defendant. The other individual parties plaintiff named in the instant action are joined as officers of Local 18. Individuals named as parties defendant in the instant action are the members of the Wisconsin Employment Relations Board and the Board's counsel, who are joined in their official capacity. The officers of an association are parties privy to an action by the association, and public officials are parties privy to an action against the body which they represent. The rule of *res adjudicata* covers not only the parties to the action but all those privy to them, and all

those represented by them. See 30 Am. Jur. 962 where it is said:

> "* * * While the general rule is that no person is bound by a judgment except those who are parties or stands in privity with others who are parties, there is an exception to the rule, of equal authority with the rule itself, in the case of persons who are virtually represented by persons on the record as parties. In such case, a judgment in favor of the parties representing the general class is operative under the doctrine of res judicata in favor of all who are thus represented, and a judgment against the parties representing the general class is operative against those represented. This doctrine does not depend upon statutory provisions; it is a rule of common law, founded on convenience and necessity. It is based upon the theory that the persons joined and not joined have a common interest, that the parties joined may be depended upon to bring forward the entire merits of the controversy as a protection to their own interests, and that the persons not joined as parties are sufficiently represented by those who are joined. * * *"

(5) The Wisconsin courts have jurisdiction of both the subject matter and the parties

The rule of *res adjudicata* applies only to judgments entered by courts of competent jurisdiction. No question has been raised with respect to the lack of jurisdiction of the Wisconsin courts to pass initially upon the validity of state statutes.*

The parties to the previous action are all residents of the state of Wisconsin and the defendants were all personally served. The plaintiffs in that action (herein the appellants) voluntarily submitted to the jurisdiction of the state court by electing to pursue their remedy there.

---

* 50 C. J. S. 530.

All the elements of *res adjudicata* were called to the attention of the District Court for the Eastern District of Wisconsin; and so it followed the only course open to it by dismissing the action as *res adjudicata*, under the general rule stated as follows in 30 Am. Jur. 943:

> "• • • Where the prior judgment is properly brought to the attention of the court, the question whether the doctrine of *res adjudicata* should be applied is one of law, and not for the discretion of the court."

III

The Motion to Dismiss Should be Granted

The appellants bring this appeal under the the provisions of 28 U. S. C. sec. 125, 1949 (June 25, 1948, Ch. 646, 62 Stat. 926) which provides in part:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order *granting or denying*, after notice of hearing, an interlocutory or permanent injunction. • • •" (Emphasis supplied.)

The District Court in the instant case did not either grant or deny an injunction. It declined jurisdiction to exercise its discretion with respect to an injunction, on the grounds of *res adjudicata*. As pointed out in *Hart Steel Co.* v. *Railroad Supply Co.* (1917), 244 U. S. 294, 299, 37 S. Ct. 506, 61 L.-Ed. 1148, the refusal of a court to entertain a suit on the grounds of *res adjudicata* is not merely a matter of practice or procedure, but is jurisdictional. As the court stated there:

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and en-

> forced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect. • • •"

As pointed out in *Southern Railway Co. v. Clift*, (1922) 260 U. S. 316, 43 S. Ct. 126, 67 L. ed. 283, the doctrine of *res adjudicata* "supersedes • • • [discretion] and compels judgment." There is raised only the question of authority of the court, to which the issue is brought after having been once adjudicated. The court has no authority to entertain the suit.

In such a case, the action of the District Court is not within the terms of 28 U. S. C. sec. 1253, because it is neither an order granting or denying an injunction, but simply a dismissal of a suit on the grounds that the court had no authority to entertain it.

There is no direct appeal to the United States Supreme Court from a judgment of a District Court, even though entered by three judges, where the judgment was not one which would have required the participation of three judges. *Wilentz v. Sovereign Camp WOW*, (1939) 306 U. S. 573, 59 S. Ct. 709, 83 L. ed. 994. Since the District Court in this case was without authority to hear the application for injunction, the participation of three judges was not required.

As was pointed out in *Baker Driveaway Co.* v. *Hamilton*, (D. C. Pa. 1939) 29 F. Supp. 693, parties who fail to appeal from a judgment of a state supreme court but thereafter proceed in a federal district court, are in effect endeavoring to appeal from the state supreme court to the federal district court. The court said:

> "The present action is equivalent to an appeal from the supreme court of Pennsylvania to this court. The district courts of the United States are not vested with

> appellate jurisdiction over the supreme court of Pennsylvania, and consequently this court cannot review or modify the judgment of the supreme court of Pennsylvania in the present case, that court having had jurisdiction over the parties and the subject matter."

The action for injunction was there dismissed in the same manner as the action in the case now before the court was dismissed by the District Court for the Eastern District of Wisconsin. The dismissal in both cases was, in substance, based on the lack of jurisdiction or power of the court to entertain the action. Under such circumstances no appeal lies directly to the Supreme Court of the United States, because there was no exercise of discretion with respect to the application for injunction.

IV

If the Motion to Dismiss Be Denied, the Motion to Affirm Should Be Granted

It was held by this Court in *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 6 S. Ct. 1023, 30 L. ed. 243, that where a motion to affirm is united with a motion to dismiss, the motion to affirm may be granted even though the motion to dismiss is denied. The arguments in support of the motion to dismiss, if they lend color for such a motion, carry even greater weight with respect to a motion to affirm. In the case of *Grubb* v. *Public Utilities Commission of Ohio* (1929), 281 U. S. 470, 50 S. Ct. 374, 74 L. Ed. 972, a motion to dismiss or affirm on the grounds of *res adjudicata* was submitted, and the motion to affirm was granted. The situation there was very similar to the case now at bar. With respect to the action in the state court, which was adjudged to be *res adjudicata*, the court said:

> "The case in the state court was so far identical with the suit in the federal court as respects subject

matter and parties that there can be no doubt that the judgment in the former, unless invalidated by some jurisdictional infirmity, operated to bar the further prosecution of the latter. That the state court had jurisdiction of the parties is plain and not questioned. But the appellant does question that it had jurisdiction of the subject matter—and this although at the outset he treated that jurisdiction as subsisting and invoked its exercise. * * *

"The appellant relies on the commerce clause of the Constitution as in some way operating to commit to the federal courts and to withhold from the state courts jurisdiction of all suits relating to the regulation or attempted regulation of interstate commerce. This view of that clause is quite inadmissible. It has no support in any quarter, is at variance with the actual practice in this class of litigation * * *."

In granting the motion to affirm the court said with respect to the doctrine of *res adjudicata:*

"The thing presented for adjudication in the case in the state court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that. *Werlein* v. *New Orleans*, 177 U. S. 390, 398, *et seq.*; *United States* v. *California and Oregon Land Co.*, 192 U. S. 355, 358.

"As the ground just described was available but not put forward the appellant must abide by the rule that a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end. *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316, 319; *United States* v. *Moser*, 266 U. S. 236, 241; *Cromwell* v. *County of Sac*, 94 U. S. 351, 352.

"We think it follows from what has been said that the objections taken to the decree below are so unsubstantial that the motion to affirm without awaiting oral argument should be sustained."

Respectfully submitted,

THOMAS E. FAIRCHILD,
Attorney General, State of Wisconsin.

STEWART G. HONECK,
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Assistant Attorney General.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 302

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, ET AL., ETC.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON AND HENRY C. RULE, INDIVIDUALLY, ETC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

J. G. HARDGROVE,
VERNON A. SWANSON,
Counsel for Appellee,
Milwaukee Gas Light Company.

MILLER, MACK & FAIRCHILD,
Of Counsel.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 4844

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, INDIVIDUALLY, AND AS OFFICERS OF LOCAL 18, UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND LOCAL 18, UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA (CIO),

Plaintiffs,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON AND HENRY C. RULE, INDIVIDUALLY, AND AS COMMISSIONERS CONSTITUTING THE WISCONSIN EMPLOYMENT RELATIONS BOARD, AND THOMAS E. FAIRCHILD, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, AND THE MILWAUKEE GAS LIGHT COMPANY, A WISCONSIN CORPORATION,

Defendants

STATEMENT OPPOSING JURISDICTION AND MOTION TO AFFIRM OR DISMISS SUBMITTED BY APPELLEE MILWAUKEE GAS LIGHT COMPANY.

The appellee Milwaukee Gas Light Company, believing that the matters set forth below will demonstrate the

lack of substance of the questions raised by this appeal, files this, its statement in opposition to the appellants' statement as to jurisdiction.

This appellee includes herein its motion to dismiss the appeal, or, in the alternative, to affirm the judgment of the District Court on the ground that the questions raised on behalf of the appellants are so unsubstantial as not to need further argument.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the District Court, this appellee asserts that the unsubstantial character of the grounds stated by the appellants is so apparent on the face of the record as to warrant the court in summarily disposing of the appeal at this stage of the proceedings under Rule 12, paragraph 3.

The matters relied upon by this appellee are more particularly stated below:

The Correctness of the Ruling of the District Court on Res Judicata Presents No Substantial Question

The record shows that all of the issues presented to the District Court had been disposed of in an action previously brought and prosecuted by the appellants in a state court. The appellants were simply seeking a new judgment in a new forum.

We submit that "the objections taken to the decree below are so unsubstantial that the motion to affirm without oral argument should be sustained."

Grubb v. *Public Utilities Comm.*, 281 U. S. 470, at 479, 50 S.Ct. 374, 74 L. Ed. 972.

Appellants' Statement as to Jurisdiction Discloses No Appellate Court Question Which Is Substantial

In their statement as to jurisdiction, the appellants say that the questions presented are (1) whether the state court judgment is *res judicata;* (2) whether the statute involved violates the 13th and 14th Amendments to the Constitution of the United States; and (3) whether the statute is in conflict with the Labor Management Relations Act of 1947.

The second and third of these would present substantial questions in a trial court, and in this court as well if properly before the court. But they will never be reached if the first is answered in the affirmative, and as to that, we submit that the record leaves no room for argument.

When appellants come to their statement that "The Questions are Substantial," they fail to distinguish between what might be substantial questions in a court of first instance, and what questions presented to this court on appeal are substantial.

The amended complaint in the action at bar opens with this statement:

"1. This is a suit of a civil nature seeking an injunction *and a declaratory judgment*, and arises under the Constitution of and the laws of the United States." (Amended Complaint, paragraph 1.)

The injunction sought is *a permanent injunction enjoining and restraining the enforcement of Subchapter III of Chapter 111, Wisconsin Statutes of 1947*, sometimes referred to as the Public Utility Anti-Strike Law. (Paragraph (d) of the prayer of Amended Complaint.)

The declaratory judgment sought is *one declaring the act invalid.* (Paragraph (e) of the prayer of Amended Complaint.)

The defendants (appellees) in addition to putting in issue the allegations of the amended complaint, pleaded that the plaintiffs, prior to the commencement of the action at bar, chose as their forum for the litigation of the same issues the Circuit Court for Milwaukee County, Wisconsin, in an action in which a judgment was entered declaring the statute valid, and denying the relief sought in all other respects. (Copies of the amended complaint in the state court action are attached as Exhibits A and B respectively to the answers of the Milwaukee Gas Light Company and of the State Official defendants.)

The issues, including the issue as to whether the judgment in a former action in the state court was *res judicata*, were submitted to the district court on the pleadings and an agreed statement of facts. (See second stipulation.)

The case was heard before a three-judge court, U. S. Circuit Judge F. Ryan Duffy and U. S. District Judges Patrick T. Stone and Robert E. Tehan sitting. The majority opinion, by Circuit Judge Duffy, was filed on April 28, 1950 (*St. John* v. *Wisconsin Employment Relations Board*, 90 F. Supp. 347—Advance Sheets). Judge Tehan filed a dissenting opinion on the same day (90 F. Supp. 352).

Findings based on the agreed statement of facts were signed by Judges Duffy and Stone on June 14, 1950. Judge Tehan dissented. Judgment was entered on June 14, 1950.

The majority opinion is so simply and clearly written that we were tempted to submit this objection and motion on that alone.

The decision of the Wisconsin Supreme Court affirming the judgment in the state court suit was rendered on July 12, 1949, and is reported under the following title:

United G., C. & C. Workers v. *Wis. E. R. Board*, 255 Wis. 154, 38 N. W. (2d) 692.

Any doubt as to the finality of that decision, so far as the constitutionality of the statute is concerned, was removed by a decision in another case rendered on May 2, 1950, after the decision of the District Court in the case at bar, and before the findings were filed and the judgment entered.

Wisconsin E. R. Board v. *Amalgamated Asso.*, 257 Wis. 43.

In that case the court said at page 52 (Advance Sheets):

> "Since we have held in *United G., C. & C. Workers v. Wisconsin E. R. Board*, 255 Wis. 154, 38 N. W. (2d) 692, and do now hold the statute to be constitutional, the final contention of the defendants that the several sections thereof are not severable need not be determined."

The Case Is Moot Except as to the Prayer for Declaratory Relief, and, as to That, the Plea of Res Judicata Is Conclusive.

It is stated in the amended complaint that this is a suit of a civil nature seeking (1) an injunction, and (2) a declaratory judgment. *The injunction sought* is a permanent injunction enjoining and restraining the enforcement of Subchapter III of Chapter 111, Wisconsin Statutes of 1947, sometimes referred to as Chapter 414, Laws of 1947. *The declaratory* judgment sought is one declaring the act invalid.

The defendants, in addition to putting in issue the allegations of the complaint, pleaded that the plaintiffs, prior to the commencement of the action at bar, chose as their forum for the litigation of the same issues the circuit court for Milwaukee County in an action in which *a judgment was entered on January 6, 1949, declaring the statute valid and denying the relief sought in all other respects.*

That judgment was affirmed by the Supreme Court of Wisconsin on July 12, 1949. (*United G., C. & C. Workers* v. *Wis. E. R. Board*, 255 Wis. 154, 38 N.W. (2d) 692.)

The prayer for relief in the amended complaint *in the state court action* reads:

> "Wherefore, plaintiff prays that the court determine and declare the rights of the parties, and declare Subchapter III of Chapter 111 of the Laws of 1947, Wisconsin Statutes, unconstitutional and invalid, and give such further relief as may be lawful, just and proper, by way of declaration of the rights of the parties."

Subdivision (e) of the prayer for relief in the amended complaint in the action at bar reads:

> "(e) This court issue a judgment declaring that the provisions of sub-chapter 3, Chapter 111 of the Wisconsin Statutes of 1947, insofar as they may be applied to penalize these plaintiffs and others for whom they are authorized to act, to compel them to submit to arbitration on any negotiable issue or which has for its purpose the punishment of the plaintiffs for having left their place of employment in concert or in agreement with others, or for having picketed the defendant company's premises, are void, illegal, unenforceable and repugnant to the United States Labor-Management Relations Act of 1947, and to the Constitution of the United States."

The granting of subdivision (e) of the prayer of the amended complaint in this action is a condition precedent to the granting of any relief to the plaintiffs.

A comparison of the amended complaints in the state court action and in the action at bar shows that the issues were the same except for the fact that a strike actually occurred; that the Board commenced an action in the Circuit Court for Milwaukee County, Wisconsin to enjoin

the strike, and procured a temporary injunction against the strike; that the strike was called off; and that the parties agreed on all the matters in dispute except for a pension plan; and that no impasse or stalemate had occurred in reference to that pension plan up to the time of the entry of judgment.

These facts will appear upon an examination of (1) the amended complaint in the action at bar, and (2) the second amended stipulation which was filed on December 16, 1949. A brief reference will be made to these sources.

It was stated in the amended complaint that the most recent of the contracts was entered into between the plaintiff Union and the defendant Company on September 24, 1948, which by its terms remained in full force and effect until June 1, 1949, and from year to year thereafter until terminated by written notice on or before April 1 of any year; that the plaintiff Union terminated the agreement as of June 1, 1949 (par. 22); that negotiations for a new contract continued up to October 4, 1949 (pars. 25 and 26); and on October 4, 1949 the plaintiffs left the employment of the defendant Company "individually, in concert, and in agreement with others, and commenced to peacefully picket the Company premises" (par. 27); that the Board secured an injunction from the Circuit Court for Milwaukee County restraining the plaintiffs "from leaving their place of employment in concert or in agreement with others, and from picketing or otherwise violating" the provisions of the statute (par. 28); that on October 6, 1949, the plaintiff Union and the defendant Company agreed upon wages, hours and other conditions of employment, but had not agreed on the exact terms and conditions of the pension plan; and "that the defendant Company threatens to invoke Section 111.55 and other provisions of Sub-Chapter III, Chapter 111, Wisconsin Statutes of 1947, to compel the plaintiffs to agree to a pension

plan as may be determined by a board of arbitrators provided for in said statutes" (par. 31).

These same matters are dealt with in the second stipulation, on which the case was submitted to the court, from which it appears that the contract of September 24, 1948 is covered in paragraph 19, the negotiations in paragraph 23, the strike in paragraph 30, and the state court action to enjoin the strike, in which a temporary injunction was issued on October 5, 1949, in paragraph 31.

Then follow paragraphs 32, 33 and 34, which read as follows:

> "32. That each party stipulates for himself that he has no present knowledge that subchapter 3 of ch. 111, Wisconsin Statutes, is being violated by the plaintiffs, or the defendant company, at the date of this stipulation. Should such violation occur in the future, the attorney general would perform such duties as are imposed upon him by the Wisconsin Statutes if so required by the Wisconsin Employment Relations Board.
>
> "33. That on October 6, 1949, plaintiff union and the defendant company agreed upon wages, hours and other conditions of employment but have not agreed on the exact terms and conditions of the pension plan for the employees of the defendant company for whom the plaintiff union is authorized to bargain. Disagreement on said pension plan was one of the principal issues in dispute on October 5 when the strike took place. If an impasse or stalemate should arise in negotiations between the company and the union with reference to a pension plan, the company will request the Wisconsin Employment Relations Board to perform its duties under subchapter 3, chapter 111, Wisconsin Statutes.
>
> "34. If an impasse or stalemate is reached in said negotiations, the Wisconsin Employment Relations Board will take steps pursuant to subchapter 3,

chapter 111, Wisconsin Statutes, to effect a settlement through conciliation or a determination through arbitration, as the case may be, and would take such steps as are authorized and as it would deem necessary to prevent or stop a violation of said subchapter by the defendant company or its employees, including plaintiffs."

It thus appears that the strike called on October 5, 1949 (second stipulation, pars. 30 and 33) was abandoned, and it does not appear that any impasse or stalemate arose in the negotiations with reference to a pension plan up to the time of the entry of judgment.

Plaintiffs in No Position to Demand Issuance of an Injunction, Either Temporary or Permanent, at the Date of the Entry of Judgment.

It now becomes our duty to suggest to the court that in truth and in fact a contract disposing of all matters in dispute between the parties, except for a certain pension plan, was entered into on October 6, 1949, which remained in force until June 1, 1950. At that time said contract was opened for negotiations, which negotiations are still in progress.

On August 14, 1950, a contract was entered into between the parties embodying a pension plan, which by its terms is to remain in effect until midnight of December 31, 1952, and that either party may request renegotiation of the provisions of that plan on and after December 1952.

By reason of these negotiations and contracts, the plaintiffs were no longer in a position to demand the issuance of an injunction, either temporary or permanent, at the date of the entry of the judgment herein.

While this does not militate against any right on the part of the plaintiffs to a declaratory judgment, it does

establish that the plaintiffs are no longer in a position to claim that the judgment of June 14, 1950 in fact operates to grant or deny an interlocutory or permanent injunction in any civil action within the meaning of Section 1253.

No review of a judgment for declaratory relief can be had on an appeal under this statute. For that reason, we submit that the appeal should be dismissed.

If, however, the view should be taken that this would not warrant a dismissal of the appeal, then we submit that the judgment should be affirmed for the reason that any claim that the state court judgment was not *res judicata* does not call for further argument.

We, of course, have in mind that the statements just made with respect to these negotiations and contracts do not appear in the record, except in part and by implication. As an appeal has been allowed, we are not in a position to present them to the District Court. The suggestion here made is analogous to the suggestion of a satisfaction of a judgment in an action for the recovery of money.

If the Appeal Be Not Dismissed, the Judgment Should Be Affirmed

The only issue remaining in this case had already been disposed of by the judgment of the state court. The proceedings in the state court action are pleaded in paragraph 22 of the answer of the Milwaukee Gas Light Company, and are supplemented by copies of the amended complaint and of the judgment in the state court action which are attached as exhibits to that answer.

The scope of the issues is also indicated in the decision filed in the circuit court action.

Omitting the recitals and the signature, the judgment entered in the circuit court action on January 6, 1949 reads as follows:

> "IT IS HEREBY ADJUDGED AND DETERMINED that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947, and does not deny to the plaintiffs nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, and does not deprive them of, any rights, privileges or protection secured to them under either of said constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947.
>
> "IT IS FURTHER ADJUDGED that the prayer of the plaintiffs in the above entitled action for further relief be and the same hereby is denied."

If that action had been commenced in the District Court, and that judgment had been entered, we submit that the District Court would not entertain the action at bar. It was properly dismissed for the reason that the issues had already been adjudicated.

The only difference in the situation presented in the court below was that the former judgment had been entered in the Circuit Court for Milwaukee County, in the State of Wisconsin. That is a court of general jurisdiction. The District Court had no broader jurisdiction.

That jurisdiction in Wisconsin is vested by the constitution of that state; and the Legislature is powerless to restrict it.

An appeal was taken from that judgment to the Supreme Court of the State of Wisconsin. That court affirmed the judgment. The decision of the Wisconsin Supreme Court was a final judgment; and if any federal question could have been presented, it was subject to review by this court. No such review was sought; and the decision is just as final and conclusive as if it had been presented to and affirmed by this court.

The Circuit Court for Milwaukee County disposed of the case by a judgment. The full text of that judgment is pleaded in the Milwaukee Gas Light Company's answer to the amended complaint (Gas Light Company answer, par. 22 (h) and Ex. B). The appeal was from the judgment. The Supreme Court of Wisconsin was empowered to reverse, affirm or modify. It neither reversed nor modified. It affirmed without qualification. Where the judgment is simply affirmed, the clerk of the Supreme Court does not transmit with the papers returned to the Circuit Court a copy of the opinion of the Supreme Court.

See Section 274.35, Wis. Stats. 1947:

> "274.35. REVERSAL, AFFIRMANCE OR MODIFICATION OF JUDGMENT; HOW REMITTED, CLERK'S FEES. (1) Upon an appeal from a judgment or order or upon a writ of error the supreme court may reverse, affirm or modify the judgment or order, and as to any or all of the parties; and may order a new trial; and if the appeal is from a part of a judgment or order may reverse, affirm or modify as to the part appealed from. In all cases the supreme court shall remit its judgment or decision to the court below and thereupon the court below shall proceed in accordance therewith.
>
> "(2) The clerk of the supreme court shall remit to such court the papers transmitted to the supreme

court on the appeal or writ of error, together with the judgment or decision of the supreme court thereon, within sixty days after the same is made, unless there is a motion for a rehearing. In case a motion for a rehearing is denied the papers shall be transmitted within twenty days after such denial.

"(3) The clerk of the supreme court shall, except when the order or judgment is affirmed, also transmit with the papers so returned by him a certified copy of the opinion of the supreme court, and his fees for such copy shall be taxed with his other fees in the case."

Of course, the District Court could take notice of the opinion of the State Supreme Court. But the fact remains that that opinion did not become part of the judgment roll. It is the judgment of the Circuit Court that we pleaded as *res judicata,* and that judgment stands without any modification.

In their statement on jurisdiction, appellees argue as though we had nothing but an *order* sustaining a demurrer. This case was not so disposed of. The Circuit Court entered a judgment. In Wisconsin, a trial court, on sustaining a demurrer, is not required to grant leave to plead over. The trial court may, if of the opinion that pleading over would be useless, enter a judgment, and that is precisely what the court did here. The court entered an order sustaining the demurrers and directing "that judgment be entered declaring the rights of the parties, and denying the prayer of the plaintiffs for further relief" (second stipulation, par. 41). That was followed up by a judgment (second stipulation, par. 42). The judgment of the Supreme Court of Wisconsin was not a judgment that the *order* sustaining the demurrers be affirmed, but was that, "on consideration of the appeal, it was ordered and adjudged by said supreme court that the *judgment*

of said circuit court of Milwaukee County be and the same was affirmed" (second stipulation, par. 43).

The Supreme Court describes the matter as an appeal "from a judgment of the Circuit Court * * * " (*United G., C. & C. Workers* v. *Wis. E. R. Board,* 255 Wis. 154, at 156.)

It is an established practice in Wisconsin that the court, "after the decision of a demurrer in the exercise of its discretion in a proper case, may refuse to countenance further proceedings on the part of a defeated pleader." (*Chris. Schroeder & Sons Co.* v. *Lincoln County,* 244 Wis. 178, at 182.)

In other words, the Circuit Court entered an order sustaining the demurrers and directing the entry of judgment, and followed that with the judgment. There was no request for leave to plead over. There was no challenge and no objection either in the Circuit Court or in the Supreme Court to the action of the Circuit Court in the proceeding to judgment.

That every issue in this action was fully litigated in the state court action is indicated by the following statement in the decision of the trial judge therein:

> "Plaintiff contends:
>
> "1. That Chap. 414, Laws of 1947, violates the 'due process of law' and the 'equal protection of the laws' provisions of the XIV Amendment to the Constitution of the United States.
>
> "2. That it likewise violates the 13th Amendment in that it imposes 'involuntary servitude' upon the plaintiffs.
>
> "3. That it impairs the obligations of contract, contrary to Sec. 10 of Article I.
>
> "4. That it constitutes an unlawful delegation of legislation, executive and judicial powers, contrary to the constitution of Wisconsin.

"5. That it violates Article VII, Section 16, Wisconsin Constitution 'in that it establishes a tribunal of conciliation with the power to render binding judgment on the parties without the agreement of both parties'.

"6. That it is violative of Article XIII, Sec. 9, Wisconsin Constitution, 'relating to the way and method of appointment of officers of the state.'

"7. That the law is in conflict with the National Labor Relations Act, as presently amended (known as the Taft-Hartley Act)."

Had there been no declaratory relief statute, the defendants could have maintained an action for substantially the same relief.

It has been held competent for a court of equity to entertain an action commenced by a person specially interested against administrative officers to enjoin them from executing a law on the ground of its being unconstitutional, when such person would be irremediably damaged.

Wadhams Oil Co. v. *Tracy,* 141 Wis. 150, 123 N. W. 785.

The Supreme Court of Wisconsin in 1936 held that it would entertain a suit for declaratory relief to determine the validity of certain acts of the legislature; and that its power to entertain the suit would not come from the act; but that the act merely authorized the court to take jurisdiction at an earlier point in time than it would do under ordinary remedial rules and procedure.

In re Petition of State ex rel. Attorney General, and others, 220 Wis. 25, 264 N. W. 633.

In *Morris* v. *Ellis,* 221 Wis. 307, 266 N. W. 921, the same court entertained a suit for declaratory relief against a light and water commission and a village. It was there

pointed out that the action or declaratory relief is essentially equitable in character, and that a court of equity has power to retain jurisdiction to give complete and effectual relief.

The reasons for sustaining the defense of *res judicata* are stated very simply and directly in the majority opinion by Circuit Judge Duffy.

> *St. John* v. *Wisconsin Employment Relations Board*, 90 F. Supp. 347.

It is submitted that that reasoning is conclusive.

District Judge Tehan, in his dissenting opinion, said:

> "If the Supreme Court had merely affirmed without opinion there would be no dissent, and if the Supreme Court's opinion had discussed only one of the constitutional questions and remained silent on the other questions raised by plaintiffs, we would have reluctantly concurred." (90 F. Supp. 353.)

On May 2, 1950, the Supreme Court of Wisconsin, in an action arising out of a dispute between The Milwaukee Electric Railway & Transport Company and its union said:

> "Since we have held in *United G., C. & C. Workers v. Wisconsin E. R. Board*, 255 Wis. 154, 38 N. W. (2d) 692, and do now hold the statute to be constitutional, the final contention of the defendants that the several sections thereof are not severable need not be determined." (257 Wis. 52 (Advance Sheets).)

The motion for rehearing pending in that case at the date of the entry of the judgment in the case at bar has since been denied. (Advance Sheets, No. 5, 257 Wis., published August 18, 1950.)

Because of the facts hereinbefore reviewed, there can be no question but that the state court passed on every

issue upon which the appellants could rely if there had been no previous decision.

Federal courts are required to give full faith and credit to judgments of state courts.

Davis v. *Davis*, 305 U. S. 32, 39-40, 59 S. Ct. 3, 83 L. Ed. 26, 118 A. L. R. 1518.

The doctrine of *res judicata* applies in Wisconsin.

Reinkey v. *Wilkins*, 172 Wis. 515, 520, 179 N. W. 751.

The doctrine of estoppel by record prevents a party, not only from litigating again what was actually litigated in the former case, but from litigating what might have been litigated therein.

Kuchenreuther v. *Chicago, M., St. P. & P. R. Co.*, 225 Wis. 613, at 615, 275 N. W. 457.

The final adjudication is conclusive, in a subsequent action between the same parties, as to all matters which were litigated or which might have been litigated in the former proceedings.

Werner v. *Reimer*, 255 Wis. 386, at 403, 39 N. W. (2d) 457.

It is not necessary to rely merely on the full faith and credit clause of the United States Constitution. On general principles of *res judicata*, the District Court was bound by the judgment of the state court.

Angel v. *Bullington*, 330 U. S. 183, at pp. 192-193, 67 S. Ct. at p. 662, 91 L. Ed. 832;

Treinies v. *Sunshine Mining Co., et al.*, 308 U. S. 66, 75-78, 60 S. Ct. 44, 84 L. Ed. 85;

American Surety Co. v. *Baldwin*, 287 U. S. 156, 53 S. Ct. 98, 77 L. Ed. 231.

A prior judgment is a finality as to the claim or demand in controversy, concluding the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Fishgold v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 282, 66 S. Ct. 1105, 90 L. Ed. 1231, 1239;
Grubb v. *Public Utilities Comm.*, 281 U. S. 470, at 479, 50 S. Ct. 374, 74 L. Ed. 972.

And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree.

Jackson v. *Irving Trust Co.*, 311 U. S. 494, 503, 61 S. Ct. 326, 85 L. Ed. 297, 302.

This is a field in which the doctrine of *res judicata* should have the most complete operation. If a judgment in an action for declaratory relief is not *res judicata* as between the parties, the statute providing therefor is an empty gesture.

Moreover, if a judgment in a class action is not *res judicata* as to the persons represented by a party or parties authorized to sue or defend and actually suing or defending in their behalf, then no such action ought to be permitted.

All that remains for consideration is whether, in view of the previous decisions on the application of that doctrine in this court, the objections taken to the judgment below are so unsubstantial that the motion to affirm without awaiting oral argument should be sustained.

Grubb v. *Publc Utilities Comm.*, 281 U. S. 470, 50 S. Ct. 374, 74 L. Ed. 972.

The arguments urged on this appeal for a reversal of the judgment have been so plainly foreclosed by decisions of this court as to make further argument unnecessary.

Missouri P. R. Co. v. *Castle,* 224 U. S. 541, 544, 32 S. Ct. 606, 56 L. Ed. 875, 878;

Chicago, R. I. & P. R. Co. v. *Devine,* 239 U. S. 52, 54, 36 S. Ct. 27, 60 L. Ed. 141, 142;

Boston v. *Jackson,* 260 U. S. 309, 314, 43 S. Ct. 129, 67 L. Ed. 274, 282;

American Surety Co. v. *Baldwin,* 287 U. S. 156, 165, 53 S. Ct. 98, 77 L. Ed. 231, 237.

We have not argued the questions upon which the court would have had occasion to pass if the case were not ruled by the doctrine of *res judicata.* We realize that if those were properly before this court, they could not be regarded as being so wanting in substance as not to need further argument.

MOTION TO DISMISS OR AFFIRM

WHEREFORE this appellee respectfully submits this statement showing that the questions upon which the decision in this case depends are so unsubstantial as not to need further argument; and this appellee respectfully moves the court to dismiss this appeal, or, in the alternative, to affirm the judgment entered below.

Dated August 23, 1950.

J. G. HARDGROVE,
VERNON A. SWANSON,
Attorneys for Appellee,
Milwaukee Gas Light Company.
MILLER, MACK & FAIRCHILD,
Of Counsel.

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No. 302
In the

Supreme Court of the United States

October Term, 1950

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, Individually, and as officers of Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and LOCAL 18, UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, (CIO),

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, E. E. GOODING, J. E. FITZGIBBON and HENRY C. RULE, individually and as Commissioners constituting the Wisconsin Employment Relations Board, and THOMAS E. FAIRCHILD, individually and as Attorney General of the State of Wisconsin, and the MILWAUKEE GAS LIGHT COMPANY, a Wisconsin corporation,

Appellees.

BRIEF OF APPELLEES EXCEPTING MILWAUKEE GAS LIGHT COMPANY

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No. 302

In the

Supreme Court of the United States

October Term, 1950

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, GORDON DONNELLY, EMIL HEIMSCH, THOMAS LANSING, JOHN F. SHEEHAN, E. F. REGNER, EDWARD P. REGAN, LA MOINE S. CARDINAL, Individually, and as officers of Local 18, United Gas, Coke and Chemical Workers of America, affiliated with the Congress of Industrial Organization, and LOCAL 18, UNITED GAS, COKE AND CHEMICAL WORKERS OF AMERICA, (CIO),

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, J. E. FITZGIBBON and HENRY C. RULE, individually and as Commissioners constituting the Wisconsin Employment Relations Board, and THOMAS E. FAIRCHILD, individually and as Attorney General of the State of Wisconsin, and the MILWAUKEE GAS LIGHT COMPANY, a Wisconsin corporation,

Appellees.

BRIEF OF APPELLEES EXCEPTING MILWAUKEE GAS LIGHT COMPANY

OPINION BELOW

The opinion of the District Court for the Eastern District of Wisconsin is reported in 90 Fed. Supp. 347, and may be found on page 91 of the original record, 59 of the printed record; dissenting opinion, page 99 of the original record and 67 of the printed record.

JURISDICTION

The judgment of the District Court was entered on June 14, 1950. The order of District Judge Robert E. Tehan allowing this appeal was entered August 8, 1950. The order of this court noting probable jurisdiction was entered on October 23, 1950. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28 of the United States Code, Sections 1253 and 2281.

STATE STATUTES INVOLVED

The pertinent state statutes, sections 111.50 to 111.65, Subchapter III of Chapter 111 of the Wisconsin Statutes for 1949 known as the Public Utility Anti-Strike Law, Ch. 414, Laws of 1947, are printed in the Appendix; Wisconsin Statutes Section 269.56 provides for Declaratory Judgments. Subsections (1), (2), (11), (12) are printed in the Appendix.

FEDERAL STATUTES INVOLVED

The federal statute involved is the Labor-Management Relations Act, 1947.

QUESTIONS PRESENTED

Is a judgment dismissing a complaint on a general demurrer entered in a state court of competent jurisdiction and affirmed on appeal by the state supreme court, from which no appeal was taken to this court, *res judicata* in a new action between the same parties in federal court even though several additional facts are alleged to have occurred if these facts were viewed prospectively by the earlier state court judgment?

The second and third questions submitted by appellant, i.e., that subchapter III of Chapter 111 of the Wisconsin Statutes violates the 13th and 14th Amendments to the U. S. Constitution and is in conflict with Labor Management Relations Act of 1947 were not considered by court below and are not properly here for determination.

With respect to these issues, our contentions are set forth in respondents' brief in Case #329, set for argument immediately following this appeal; we hereby incorporate them herein by way of reference, and will undertake to provide counsel herein with sufficient copies thereof.

STATEMENT

We refer to the summary of the proceedings in the opinion below, 90 F. Supp. 348-349 (R. 59-62) and do not here reprint it.

SUMMARY OF ARGUMENT

All the factors necessary to, and requiring, the application of the doctrine of *res judicata* are present:

1. The cause of action and subject matter are the same.

2. The parties are the same.

It does not appear that the appellants take issue with the determination below that the same parties are here at bar as were before the state court. (See Questions Involved, p. 4, App. Brief.)

3. The state court had jurisdiction.

We contend the Declaratory Judgments Act, invoked by appellants in the State Court Action, led to and supported the judgment of the state circuit court, determining the rights of the parties.

Appellants contend the doctrine of *res judicata* is not applicable because the state court judgment was entered without considering that the employment relationship was subject to the Federal Act.

We submit that the state court did consider the issue and held against the appellants. The amended complaint of appellants in the state court Declaratory Judgment action, paragraph 22 (R. 27) is conclusive of this.

The state court judgment determined Subchapter III of Chapter 111 of the Wisconsin Statutes to be a valid and constitutional act, not in conflict with the Federal act, nor otherwise invalid (R. 29). The demurrer admitted the allegations of the complaint; the lower courts herein both concluded that the amended complaint of the union did raise the issue, and it was decided against the pleader (appellant).

ARGUMENT

I.

THE STATE COURT JUDGMENT IS *RES JUDICATA* AS TO ISSUES SOUGHT TO BE RAISED ON THIS APPEAL

It has regularly been held by the United States Supreme Court that a judgment of a state court of competent jurisdiction is *res judicata* and bars a subsequent action in a federal court where the parties and subject matter are the same.

A. The Causes of Action and the Subject Matter are the Same

(1) causes of action are the same

(2) the allegations in the two pleadings are substantially the same

(3) facts necessary to sustain the two actions are the same

(4) the questions essential to a determination in the two suits are the same

(5) issues in state court litigation identical to those in this federal court action

In the state court action the union claimed that subchapter III, chapter 111, Wisconsin Statutes, was unconstitutional because it violated sec. 10, Art. I, and the XIII and XIV Amendments to the Constitution of the United States. It so alleges in the present action.

In the state court action the union claimed that subchapter III, chapter 111, Wisconsin Statutes, was in conflict with the Labor-Management Relations Act of 1947 and the declared public policy of the United States. It so claims in this action.

The above claims were made with respect to the labor relations of the Milwaukee Gas Light Company. They are so made now.

The union in the prior state court action alleged that the Gas Company was engaged in operations affecting interstate commerce. It does so now.

Each of the above issues as to constitutionality is common to both the prior state court action and to this action. Each of the above issues was decided against the union in the state court action.

Appellants contend at pages 12-14 of their brief that the complaint before the district court in the case at bar necessarily is materially different from the complaint in the Declaratory Judgment Action. It is our position that the state courts considered prospectively the allegations of the complaint now stipulated at paragraphs 32, 33 and 34 of the stipulation herein and determined the issue adversely to the appellants and that the paragraphs of the stipulation do not present any material facts not considered by the state court judgments. Appellants accordingly have not shown how it is material, or that the court in the Declaratory Judgment case did not in effect consider the same contentions.

None of the facts which have occurred since the decision in the state court action can change in any way the issues of the constitutionality of subchapter III, chapter 111, Wisconsin Statutes, as between the parties.

A comparison of the amended complaints in the state court action and in the action at bar shows that the issues were the same except for the fact that after the adjudication of the state court action a strike actually occurred; that the board commenced an action in the Circuit Court for Milwaukee County, Wisconsin to enjoin the strike, and procured a temporary injunction against the strike; that the strike was subsequently terminated; and that the parties agreed on all the matters in dispute except for a pension plan; and that no impasse or stalemate had occurred in reference to that pension plan up to the time of the entry of judgment in this action.

These facts will appear upon an examination of (1) the amended complaint in the action at bar (R. 1), and (2) the second amended stipulation which was filed on December 16, 1949 (R. 34). A brief reference will be made to these sources.

It was stated in the amended complaint that the most recent of the contracts was entered into between the plaintiff union and the defendant company on September 24, 1948, which by its terms remained in full force and effect until June 1, 1949, and from year to year thereafter until terminated by written notice on or before April 1 of any year; that the plaintiff union terminated the agreement as of June 1, 1949 (R. 5, par. 22); that negotiations for a new contract continued up to October 4, 1949 (R. 6, pars. 25 and 26); and on October 4, 1949 the plaintiffs left the employment of the defendant company "individually, in concert, and in agreement with others, and commenced to peacefully picket the company premises" (R. 27, par. 27); that the board secured an injunction from the Circuit Court for Milwaukee County restraining the plaintiffs "from

leaving their place of employment in concert or in agreement with others, and from picketing or otherwise violating" the provisions of the statute (R. 6, par. 28); that on October 6, 1949, the plaintiff union and the defendant company agreed upon wages, hours and other conditions of employment, but had not agreed on the exact terms and conditions of the pension plan; and "that the defendant company threatens to invoke Section 111.55 and other provisions of Subchapter III, chapter 111, Wisconsin Statutes of 1947, to compel the plaintiffs to agree to a pension plan as may be determined by a board of arbitrators provided for in said statutes" (R. 7, par. 31).

These same matters are dealt with in the second stipulation on which the case was submitted to the court, from which it appears that the contract of September 24, 1948 is covered in paragraph 19 (R. 38), the negotiations in paragraph 23 (R. 39), the strike in paragraph 30 (R. 42), and the state court action to enjoin the strike, in which a temporary injunction was issued on October 5, 1949, in paragraph 31 (R. 42-43).

Then follow paragraphs 32, 33 and 34, which read as follows:

> "32. That each party stipulates for himself that he has no present knowledge that subchapter 3 of ch. 111, Wisconsin Statutes, is being violated by the plaintiffs, or the defendant company, at the date of this stipulation. Should such violation occur in the future, the attorney general would perform such duties as are imposed upon him by the Wisconsin Statutes if so required by the Wisconsin Employment Relations Board.
>
> "33. That on October 6, 1949, plaintiff union and the defendant company agreed upon wages, hours and

other conditions of employment but have not agreed on the exact terms and conditions of the pension plan for the employees of the defendant company for whom the plaintiff union is authorized to bargain. Disagreement on said pension plan was one of the principal issues in dispute on October 5 when the strike took place. If an impasse or stalemate should arise in negotiations between the company and the union with reference to a pension plan, the company will request the Wisconsin Employment Relations Board to perform its duties under subchapter 3, chapter 111, Wisconsin Statutes.

"34. If an impasse or stalemate is reached in said negotiations, the Wisconsin Employment Relations Board will take steps pursuant to subchapter 3, chapter 111, Wisconsin Statutes, to effect a settlement through conciliation or a determination through arbitration, as the case may be, and would take such steps as are authorized and as it would deem necessary to prevent or stop a violation of said subchapter by the defendant company or its employees, including plaintiffs" (R. 43-44).

It thus appears that the strike called on October 5, 1949 (second stipulation, pars. 30 and 33, R. 42, 43) was abandoned, and it does not appear that any impasse or stalemate arose in the negotiations with reference to a pension plan up to the time of the entry of judgment.

All of the issues in both the state court action and this action arose over one subject matter which is common to both actions—the claimed repugnancy of subchapter III, chapter 111, Wisconsin Statutes, to and in violation of the Federal Constitution and in conflict with the Labor-Management Relations Act of 1947 in the state court action, and since these are the same issues the union is seek-

ing to raise in this action, the causes of action in both actions must of necessity be identical. This is true even though some of the acts with which the statute deals and which were considered prospectively and in the abstract by the state court in the declaratory judgment action have now occurred.

See, *Baltimore S. & Co. v. Phillips*, (1927) 274 U. S. 316, 47 S. Ct. 600, 71 L. ed. 1069.

That the causes of action are identical in both actions is proved by the test most commonly stated in determining whether causes of action are identical so as to warrant application of the rule of res judicata.[1] The test is: Will the same evidence sustain both actions. If it will, then the causes of action are identical and the judgment in the first action is a bar. It is clear that whatever evidence would have sustained the state court action would also sustain this action, or whatever evidence would be sufficient to sustain this action would also have been sufficient to authorize a recovery in the prior state court action.

Other facts which tend to prove the identity of the causes of action in both actions are: (1) the grounds of the two actions are the same; (2) the allegations in the pleadings are substantially the same; (3) the facts essential to maintenance of the two actions are the same; (4) the questions essential to decision of the first controversy are the same as those in the second action.

Where the causes of action are identical the judgment in the first action is res judicata and conclusive not only

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[1] *Nickoll v. Racine Cloak & Suit Co.*, (1927) 194 Wis. 298, 216 N. W. 502, 50 C. J. S. §648.

as to all matters litigated and decided by it, but as to all relevant issues which could have been raised and litigated.

UNITED STATES

Heiser v. Woodruff, (1946) 327 U. S. 726, 66 S. Ct. 853, 90 L. ed. 970;

Bates v. Bodie, (1918) 245 U. S. 520, 38 S. Ct. 182, 62 L. ed. 444;

Troxell v. Delaware Lack. & West. R. R. Co., (1913) 227 U. S. 434, 33 S. Ct. 274, 57 L. ed. 586;

Cromwell v. County of Sac, (1876) 94 U. S. 351, 24 L. ed. 195.

WISCONSIN

Reinkey v. Wilkins, (1920) 172 Wis. 515, 179 N. W. 751;

Shepardson v. Cary, Executor, etc., (1871) 29 Wis. 34.

See also:

50 C. J. S. §§657, 900 (b).

Thus the union is barred from raising issues in this action which it could have raised in the state court action which involved the same cause of action based on the alleged violations by subchapter III, chapter 111, Wisconsin Statutes of the Federal Constitution and the alleged conflict between that statute and the Labor-Management Relations Act of 1947. Obviously since the statute is the same as the one involved in the prior state court action, no new grounds of its unconstitutionality can have since

arisen that were not available to the union at the time of the state action.

To repeat, since the causes of action in both actions were identical, the judgment in the prior state court action is res judicata and conclusive on the parties as to all issues that were litigated and as to all issues that might have been raised.

In *Chicot County Dist. v. Bank*, (1940) 308 U. S. 371, 60 S. Ct. 317, 84 L. ed. 329, the court said at page 378:

> "The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.' *Grubb v. Public Utilities Comm'n, supra; Cromwell v. County of Sac, supra.*"

In *Jackson v. Irving Trust Co.*, (1941) 311 U. S. 494, 61 S. Ct. 326, 85 L. ed. 297, the court said at page 503:

> "By the provisions of that Act the jurisdiction of the District Court attached when the suit was brought upon the claim which the plaintiffs as non-enemy claimants set forth. However the issues were labeled the court was authorized to determine them. *Texas & Pacific Ry. Co. v. Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 274; *Stoll v. Gottlieb, supra*, p. 171. And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that

there was full opportunity to litigate it and that it was adjudicated by the decree. *Cromwell v. County of Sac*, 94 U. S. 351, 352; *Grubb v. Public Utilities Commission*, 281 U. S. 470, 479; *Chicot County Drainage District v. Baxter State Bank, supra; Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 403. If the District Court had erred in dealing, or in failing to deal, with any issue thus involved, the remedy was by appeal and no appeal was taken."

In *Heiser v. Woodruff*, (1946) 327 U. S. 726, 66 S. Ct. 853, 90 L. ed. 970, 735-736, the court said:

"In general a judgment is *res judicata* not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit. *Cromwell v. County of Sac, supra*, 352; *Grubb v. Public Utilities Comm'n, supra*, 479; *Chicot County Dist. v. Bank, supra*, 375. * * *"

In *Fishgold v. Sullivan Corp.*, (1946) 328 U. S. 275, 66 S. Ct. 1105, 90 L. ed. 1230, 282-283, the court said:

"* *. * This elementary principle has long been recognized. Black, The Law of Judgments (2d ed.), pp. 764, 821, 936. As stated in *Cromwell v. County of Sac*, 94 U. S. 351, 352, a prior judgment 'is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' And see *Rooker v. Fidelity Trust Co.*, 263 U. S. 413, 415; *Grubb v. Public Utilities Commission*, 281 U. S. 470, 479; *Stoll v. Gottlieb*, 305 U. S. 165; *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U. S. 371, 375, 378. * * *"

B. The Parties in State Court Action are same as those herein

(1) Plaintiffs in both cases are union and officers thereof who represent the membership

We refer to the opinion of the court below in the case at bar:

"We now focus our attention on the question whether the parties to the State court action were the same as the parties in the case at bar. Manifestly they are not identical. Certain individuals are named in the pleadings in the case at bar, both as plaintiffs and defendants, who were not thus named in the State court action. The union and Thomas Lansing, its then president, were plaintiffs in the State court action and they are also plaintiffs in the case at bar. The parties plaintiff are not changed because the amended complaint herein now names Arthur St. John, the current president of the union, and lists other officers of the union and members of its bargaining committee. Plaintiffs in both cases are the union and the officers thereof who represent the membership. We hold that the parties plaintiff are the same in both actions" (R. 64-65).

(2) Defendants are the same in both actions

Again, we refer to the opinion below:

"The Wisconsin Employment Relations Board and the Milwaukee Gas Light Company were named defendants in both actions. In addition, the three individuals who are the Wisconsin Employment Relations Board are named individually in the case at bar, as well as Thomas E. Fairchild, Attorney General of the

State of Wisconsin. However, the three members of the board are sued in the present action only as members of the board, and not in their capacity as private citizens. The Attorney General is sued only in his official capacity, that of attorney representing the Wisconsin Employment Relations Board. We hold that the parties defendant are the same in both actions" (R. 65).

C. The Adjudication of the State Court was Final

The decision of the Wisconsin Supreme Court affirming the judgment in the state court suit was rendered on July 12, 1949, and is reported under the following title:

United G., C. & C. Workers v. Wis. E. R. Board, (1949) 255 Wis. 154, 38 N. W. 2d 692.

Any doubt as to the finality of that decision, so far as the constitutionality of the statute is concerned, was removed by a decision in another case rendered on May 2, 1950, after the decision of the District Court in the case at bar, and before the findings were filed and the judgment entered.

Wisconsin E. R. Board v. Amalgamated Asso., (1950) 257 Wis. 43, 42 N. W. 2d 471.

In that case the court said at page 52:

"Since we have held in *United G., C. & C. Workers v. Wisconsin E. R. Board*, 255 Wis. 154, 38 N. W. (2d) 692, and do now hold the statute to be constitutional, the final contention of the defendants that the several sections thereof are not severable need not be determined."

The union herein, Local 18 and the Gas Company herein, were before the Wisconsin Supreme Court again, in October 1950, in connection with contempt proceedings arising out of a labor dispute. In its opinion the Wisconsin Supreme Court said:

> "The Union asserts that subch. III of ch. 111, Stats., conflicts with the Federal Labor Management Relations Act of 1947, and violates the state and federal constitutions.
>
> "The constitutionality of the public utility anti-strike law was questioned in a previous action in this court. *United G., C. & C. Workers v. Wis. E. R. Board,* (1949) 255 Wis. 154, 38 N. W. (2d) 692. The law has been held to be a proper legislative enactment."

It is well established by many decisions of the United States Supreme Court that where no appeal is taken from the judgment of a state court it is conclusive on federal courts even as to federal constitutional questions decided in the state action.

In *Angel v. Bullington*, (1947) 330 U. S. 183, 67 S. Ct. 657, 91 L. ed. 832, the plaintiff, Bullington, brought suit against the defendant for a deficiency judgment in the state courts of North Carolina and lost in the state supreme court on the grounds that a state statute prevented the state courts from entertaining a suit for a deficiency judgment, in spite of plaintiff's contention that the Federal Constitution precluded the state from closing the doors of its courts to him. Without appealing the state supreme court decision to the United States Supreme Court the plaintiff brought suit on the same claim and against the same defendant in a federal court. The case eventually wound up in the United States Supreme Court which in holding that

the judgment of the state supreme court was res judicata and barred the subsequent action in federal court, said:

> "* * * Bullington could have come here, not merely by the grace of this Court on certiorari, but on appeal * * *. Since it was open for Bullington to come here to seek reversal of the decision of the North Carolina Supreme Court shutting him out of the North Carolina courts and he chose not to do so, the decision of the North Carolina Supreme Court concluded an adjudication of a federal question even though it was not couched in those terms. For purposes of litigating the issues in controversy in the North Carolina action, the North Carolina Supreme Court was an intermediate tribunal. If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him. * * * He forewent his right to have a higher court, this Court, enable him to win his chance by holding that he was right and that the North Carolina Supreme Court was wrong. He cannot begin all over again in an action involving the same issues before another forum in the same State." (91 L. ed. 836-837)

In *Grubb v. Public Utilities Commission of Ohio*, (1930) 281 U. S. 470, 50 S. Ct. 374, 74 L. ed. 972, the Bus Company brought suit against the commission in federal court on the grounds that an order of the commission was an attempted regulation of interstate commerce by a state agency contrary to the commerce clause of the Federal Constitution and denied to the Bus Company privileges and immunities guaranteed by the Fourteenth Amendment.

While suit was pending in federal court the Bus Company appealed the order to the state supreme court on the same grounds. The state court affirmed the order. No ef-

fort was made to have the state supreme court judgment reviewed by the United States Supreme Court. After the three months allotted for appeal had expired the commission set up the state court judgment as a bar to the suit in federal court. The federal court thereupon dismissed the suit on the grounds that the state supreme court judgment was res judicata and barred the Bus Company from further litigating the matter. The United States Supreme Court affirmed the decree of the lower federal court.

In *Mitchell v. First National Bank of Chicago,* (1901) 180 U. S. 471, 21 S. Ct. 418, 45 L. ed. 627, the United States Supreme Court held that a final judgment on the merits in the courts of a state is conclusive in the federal courts between the parties or their privies whether the question determined was one of federal, general, or local law.

It should be noted that it is the *judgment* of the state *circuit* court which has been pleaded as *res judicata* in the action at bar. On the appeal from the state circuit court judgment, the Wisconsin Supreme Court affirmed the circuit court judgment. In its opinion on the appeal the court said, at page 157 of 255 Wis.:

> "We have no findings of fact before us, but upon the filing of a demurrer all of the well-pleaded facts are accepted as true for the purpose of the disposition of this controversy."

At page 158 of 255 Wis., the court said:

> "Therefore, upon this record, we can only determine whether or not ch. 414, Laws of 1947, is a valid and constitutional enactment. * * *"

In a later case, *Wisconsin E. R. Board v. Amalgamated Asso.,* (1950) 257 Wis. 43, 42 N. W. 2d 471, the court reit-

erated its holding of constitutionality and in a still later case, *Wisconsin E. R. Board v. Milwaukee Gas Light Co.*, (1950) 258 Wis. 1, the court said:

> "The constitutionality of the public utility anti-strike law was questioned in a previous action in this court. *United G., C. & C. Workers v. Wis. E. R. Board* (1949), 255 Wis. 154, 38 N. W. (2d) 692. The law has been held to be a proper legislative enactment."

Before the three judge court below, in the case at bar, it was contended that all of the issues were not squarely met in the opinion of the Wisconsin Supreme Court on the appeal there in the former action. In its decision, the court below, in the case at bar said with respect to this contention:

> "It is true that the opinion of the Wisconsin Supreme Court contains some equivocal language which furnishes some foundation for the contention of plaintiffs herein that all of the issues were not squarely met. Nevertheless it is the action which the Supreme Court took which is important rather than any reasons which it might give for such action. The appeal was from the judgment of the Circuit Court. Included in the issues squarely raised were the claimed repugnancy of subchapter 3 of Chap. 111 to the federal Constitution and to the Labor-Management Relations Act of 1947. The Wisconsin Supreme Court was empowered to reverse, affirm or modify the Circuit Court judgment; it did not reverse or modify, but affirmed the judgment without any condition or qualification. The mandate of the Wisconsin Supreme Court did not affirm an order sustaining a demurrer, but rather it affirmed the judgment of the Circuit Court of Milwaukee County in that case. * * *"

It is settled law in Wisconsin that the judgment of the state supreme court affirming that of the court below is conclusive upon the rights of the parties, and covers every ground of objection thereto, though the court below may have considered one ground and the supreme court another. *Ean v. The Chicago, Milwaukee & St. Paul R. Co.*, (1898) 101 Wis. 166, 76 N. W. 329. The judgment of the trial court when affirmed by the supreme court becomes in legal effect the judgment of the supreme court. *Hoan v. Journal Co.*, (1942) 241 Wis. 483, 6 N. W. 2d 185.

D. The State Court had Jurisdiction of Subject matter and Parties

The only questions concerning a prior state court judgment which are open in a subsequent action in federal court involving the same parties and issues are those of the jurisdiction of the state court over the parties and the subject matter and the one asserting the lack of such jurisdiction has the burden of proving such lack.[1]

There can be no question that the Milwaukee County Circuit Court and Wisconsin Supreme Court had jurisdiction over the parties and issues in the prior state action. The parties to the previous action are all residents of the State of Wisconsin and service was had on each of them. The subject matter of the action, though it involved federal as well as state questions, was also within the jurisdiction of the state courts, which are competent to pass on federal questions.

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[1] 50 C. J. S. §900 (d).

The plaintiffs in that action (herein the appellants) voluntarily submitted to the jurisdiction of the state court by electing to pursue their remedy there.

E. No Valid Distinction Between the Actions Can be Drawn even if Different Relief is Prayed

The amended complaint in the action at bar opens with this statement:

"1. This is a suit of a Civil nature seeking an injunction *and a declaratory judgment*, and arises under the Constitution of and the laws of the United States." (Amended Complaint, paragraph 1, R. 1.)

The injunction sought is a permanent injunction enjoining and restraining the enforcement of Subchapter III of Chapter 111, Wisconsin Statutes of 1947, sometimes referred to as the Public Utility Anti-Strike Law. (Paragraph (d) of the prayer of Amended Complaint, R. 12.)

The declaratory judgment sought is one declaring the act invalid. (Paragraph (e) of the prayer of Amended Complaint, R. 12-13.)

The fact that in the present action the union seeks injunctive relief in addition to a declaratory judgment fixing the rights and status of the parties in no way affects the conclusiveness of the prior state court judgment.

> "* * * If the causes of action are substantially the same, a difference in the relief sought will not prevent the judgment in the state court from operating as an estoppel in the federal court. * * *" (50 C. J. S. §900 (a))

And in 30 Am. Jur., Judgments, §176, it is said:

"* * * On the other hand, the fact that a different form or measure of relief is asked does not preclude the application of the judgment to estop the maintenance of the second action."

II.

THE ADJUDICATION OF THE STATE COURT WAS ON THE MERITS

A. The Merits of a Claim are Disposed of when it is Refused Enforcement

The contention of the appellants at page 7 of their brief is: that they, in effect, never had a cause of action so that Wisconsin judgment in Declaratory Judgment action can not be res judicata. This is, we submit, contrary to the language of the Declaratory Judgment Act, Sec. 269.56, Wis. Stats. The contention is not supported by the decision in *United G., C. & C. Workers v. Wis. E. R. Board,* (1949) 255 Wis. 154, 38 N. W. 2d 692; since plaintiff was proceeding in good faith, and while believing it had a cause of action, in good faith, it put its claim forward. The declaration by the court was negative. Sec. 269.56, Wis. Stats.

In *Miller v. Currie,* (1932) 208 Wis. 199, 203, 242 N. W. 570 by Chief Justice Rosenberry, the court said:

"* * * By the very words of the statute the discretion given to the court is not a discretion to entertain the action but to enter or decline to enter the judgment or decree. * * *"

Appellants contend at page 8 of their brief that the Wisconsin court construed the Declaratory Relief Act differently in an earlier case.

If the court construed the statute (sec. 269.56, Wis. Stats.) in *Heller v. Shapiro,* (1932) 208 Wis. 310, 242 N. W. 174 as contended for by appellant here, then the brief answer is that it was not so construed (sec. 269.56, Wis. Stats.) in *United G., C. & C. Workers v. Wis. E. R. Board,* (1949) 255 Wis. 154, 38 N. W. 2d 692. This is clear from the language of the Wisconsin Supreme Court in *Wisconsin E. R. Board v. Amalgamated Asso.,* (1950) 257 Wis. 43, 52, 42 N. W. 2d 471 where the court said:

> "Since we have held in *United G., C. & C. Workers v. Wisconsin E. R. Board,* 255 Wis. 154, 38 N. W. (2d) 692, and do now hold the statute to be constitutional, * * *."

We refer to the opinion below in the case at bar:

> "Plaintiffs' argument that all of the merits of the controversy were not passed upon is conclusively answered in *Angel v. Bullington, supra,* where the controlling opinion holds: (p. 190)
>
> " 'It is suggested that the North Carolina Supreme Court did not adjudicate the "merits" of the controversy. It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the "merits" in the sense of the ultimate substantive issues of a litigation. An adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the States. . . .
>
> " 'The "merits" of a claim are disposed of when it is refused enforcement. If an asserted federal claim

is denied enforcement on a professed local ground, but a so-called local ground which is subject to review here because it is in fact the adjudication of a federal question, then the "merits" of that claim were adjudicated in the only sense that adjudication of the "merits" is relevant to the principles of *res judicata*. . . .'" (R. 64)

B. No Valid Distinction can be Drawn between a Judgment entered Sustaining a Demurrer to a Complaint and a Judgment entered after a Trial upon Presentation of Evidence

Appellants contend, at page 9, of their brief, that because, in another action, the Supreme Court reversed, that it should have reversed in its state court action.

In the companion case, also asking for Declaratory Relief, *Amalgamated Assoc., etc. v. Milwaukee E. R. & T. Co.* (1949) 255 Wis. 163, 38 N. W. 2d 697, the circuit court had erroneously proceeded to judgment, instead of dismissal after overruling plaintiffs' demurrer to answer. Although we are not here concerned with the correctness of the judgment in the companion case, in that case the complainant declined to proceed with the proof, so its complaint was ordered dismissed.

Appellants rely on the case of *Chas. H. Stehling Co. v. Milcor Steel Co.*, 242 Wis. 629, 9 N. W. 7d 78. This decision, referred to by appellant, is inapplicable because there the demurrer was not to the amended complaint as here, in the case at bar.

Appellants contend, at page 11 of their brief, that the decision in *United States F. & G. Co. v. Pullen*, (1939) 230 Wis. 137, is not applicable since no claim is made that

a second and subsequent demurrer in the same law suit is not properly considered by a court.

The judgment was no less one upon the merits because it was entered upon general demurrer than it would have been if it had been entered after trial. The only difference between a judgment upon demurrer and one after trial is that upon demurrer the facts pleaded are admitted instead of proven. In arriving at its judgment, the court considers all the facts pleaded by the plaintiff and could have no other facts before it had the issues gone to trial.

In *Ean v. The Chicago, Milwaukee & St. Paul R. Co.*, (1898) 101 Wis. 166, 170-171, 76 N. W. 329 it was stated that the judgment entered by the trial court is upon affirmation "in legal effect, the judgment of this court." The effect of the Supreme Court affirmance was there stated to render the judgment *res judicata* as to all matters upon which the trial court passed as well as on those discussed by the Supreme Court. The court said:

> "* * * It may be stated as elementary that the judgment is conclusive upon every matter upon which the court did actually pass, or upon which it might have passed, in making its decision. The objection to the complaint was that it did not state a cause of action. That covered every ground that could be urged against it, and the decision thereon is conclusive, although the court below may have considered one ground and this court another."

It is possible that a demurrer on limited grounds such as defect of parties might not give rise to the defense of *res judicata*; but a general demurrer on the basis of the objection that the complaint does not state a cause of action admits all factual allegations and raises all the issues that

could be raised in a trial. That is the law of Wisconsin as was laid down in the case of *Ean v. Chicago, Milwaukee & St. Paul R. Co.*, (1898) 101 Wis. 166, 76 N. W. 329, above quoted, in which the judgment pleaded as *res judicata* was entered upon a demurrer *ore tenus*.

Appellants contend, at pages 14-17 of their brief, the doctrine of res judicata is not applicable because the state court judgment was entered without considering that the employment relationship was subject to the Federal Act.

We submit that the state court did consider the issue and held against the appellants. The amended complaint of appellant in the state court Declaratory Judgment Action, paragraph 22 (R. 27) recites:

> "That the said defendant company, and its employees, are subject to and affected by the National Labor Relations Act as Amended on June 23rd, 1947, by the Congress of the United States, otherwise known as the Labor Management Relations Act of 1947."

The state court judgment determined that Subchapter III of Chapter 111 of the Wisconsin Statutes to be a valid and constitutional act, not in conflict with the Federal Act, not otherwise invalid (R. 29).

The demurrer admitted the allegations of the complaint; the lower courts herein both concluded that the amended complaint of the union did raise the issue, and it was decided against the pleader.

We quote from the decision of the state trial court (R. 51):

> "Plaintiffs contend:
>
> "1. That Chap. 414, Laws of 1947, violates the 'due process of law' and the 'equal protection of the laws'

provisions of the XIV Amendment to the Constitution of the United States.

"2. That it likewise violates the 13th Amendment in that it imposes 'involuntary servitude' upon the plaintiffs.

"3. That it impairs the obligations of contract, contrary to Sec. 10, of Article I.

"4. That it constitutes an unlawful delegation of legislation, executive and judicial powers, contrary to the constitution of Wisconsin.

"5. That it violates Article VII, Section 16, Wisconsin Constitution 'in that it establishes a tribunal of conciliation with the power to render binding judgment on the parties without the agreement of both parties.'

"6. That it is violative of Article XIII, Sec. 9, Wisconsin Constitution, 'relating to the way and method of appointment of officers of the state'.

"7. That the law is in conflict with the National Labor Relations Act, as presently amended (known as the Taft-Hartley Act)" (R. 51).

It is well established by decisions of the United States Supreme Court that a judgment sustaining a demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action *is an adjudication upon the merits* and may be pleaded in bar of another suit on the same facts. The judgment is conclusive not only of the matters actually adjudicated but also of any others which could have been determined at that time.

In *Northern P. R. v. Slaght*, (1907) 205 U. S. 122, 130, 27 S. Ct. 442, 51 L. ed. 738, the court said:

"* * * It is well established that a judgment on demurrer is as conclusive as one rendered upon proof. *Gould v. Evansville & Crawfordsville R. R. Co.*, 91 U. S. 526; *Bissel v. Spring Valley Township*, 124 U. S. 228; Freeman on Judgments, section 267. * * *"

See, also:

Bissell v. Spring Valley Township, (1888) 124 U. S. 225, 8 S. Ct. 495, 31 L. ed. 411;

Gould v. Evansville and Crawfordsville R. R. Co., (1875) 91 U. S. 526, 23 L. ed. 416;

Aurora City v. West, (1868) 74 U. S. 82, 7 Wall. 82, 19 L. ed. 42;

Ellis v. The Northern Pacific R. Co., (1891) 80 Wis. 459, 50 N. W. 397;

Lewko v. Chas. A. Krause Milling Co., (1935) 219 Wis. 6, 261 N. W. 672.

In *Riehle v. Margolies*, (1929) 279 U. S. 218, 225, 49 S. Ct. 310, 73 L. ed. 669, the court said:

"* * * A judgment of a court having jurisdiction of the parties and of the subject-matter operates as *res judicata*, in the absence of fraud or collusion, even if obtained upon a default. * * *"

C. No Valid Distinction can be Drawn between the Bar Arising after Final Judgment for Declaratory Relief and the Bar Arising after a Judgment Otherwise

The matter sought to be adjudicated here, as in the state court action, was the alleged repugnancy of the state act to the federal act. The uncertainty is claimed by appellants in their amended complaint below, at paragraph 37 (R. 9),

> "The laws of Wisconsin are in direct conflict with the Labor Management Relations Act, 1947."

The alleged repugnancy was ripe for determination under the Declaratory Judgment Act (R-Ap. 43-44), under the pleadings, and under the Wisconsin rule, that only where the alleged uncertainty could not be terminated or the controversy settled would no declaration be entered. *New Amsterdam Casualty Co. v. Simpson*, (1941) 238 Wis. 550, 300 N. W. 367.

III.

A JUDGMENT IN AN ACTION IS CONCLUSIVE ON ALL NAMED PARTIES AND ALL THOSE IN PRIVITY WITH THEM

Local 18 of the United, Gas, Coke and Chemical Workers of America and Thomas Lansing (appellants here) were parties plaintiff in the action before the Wisconsin court, and the Milwaukee Gas Light Company and Wisconsin Employment Relations Board (appellees here) were parties defendant. The other individual parties plaintiff named in the instant action are joined as officers of Local

18. Individuals named as parties defendant in the instant action are the members of the Wisconsin Employment Relations Board and the Board's counsel, who are joined in their official capacity. The officers of an association are parties privy to an action by the association, and public officials are parties privy to an action against the body which they represent. The rule of *res judicata* covers not only the parties to the action but all those privy to them, and all those represented by them. See 30 Am. Jur. 962 where it is said:

> "* * * While the general rule is that no person is bound by a judgment except those who are parties or stand in privity with others who are parties, there is an exception to the rule, of equal authority with the rule itself, in the case of persons who are virtually represented by persons on the record as parties. In such case, a judgment in favor of the parties representing the general class is operative under the doctrine of res judicata in favor of all who are thus represented, and a judgment against the parties representing the general class is operative against those represented. This doctrine does not depend upon statutory provisions; it is a rule of common law, founded on convenience and necessity. It is based upon the theory that the persons joined and not joined have a common interest, that the parties joined may be depended upon to bring forward the entire merits of the controversy as a protection to their own interests, and that the persons not joined as parties are sufficiently represented by those who are joined. * * *"

In *Warner v. Trow*, (1874) 36 Wis. 195, 200, the Supreme Court said:

> "* * * In order to give full effect to the rule that the judgment of a course of competent jurisdiction is

final and conclusive upon the rights of the parties touching the subject matter of the suit, not only the parties themselves are held to be bound, but also all persons who are represented by the parties, and claim under them, or in privity with them, must be equally concluded by it. * * *"

Sec. 260.12 of the Wisconsin Statutes for 1949 provides:

"Parties united in interest to be joined; class actions; alternative joinder. Of the parties to the action those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should be joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole. And when more than one person makes a separate claim for damage against the same person or persons based upon the same alleged negligence, they may unite in prosecuting their claims in one action."

In the case of *Grand Int. Brotherhood of L. Engineers v. Mills*, (1934) 43 Ariz. 379, 411, 31 P. 2d 971 it was held:

"* * * In the case of *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356, 41 Sup. Ct. 338, 341, 65 L. Ed. 673, decided after the change in the rules, the court called particular attention to this fact, and held that a class suit would bind all persons of the class, even though they were not actually represented in the suit.

We quote from that case as follows:

" 'Class suits have long been recognized in federal jurisprudence. In the leading case of *Smith v. Sworm-*

stedt, 16 How. (U. S.) 288, 303, 14 L. Ed. 942, 948, of such suits this court said:

"'"Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and mained."'"

In *Hromek v. Freie Gemeinde*, (1941) 238 Wis. 204, 209, 298 N. W. 587, the court said:

"* * * The interpleaded union is an unincorporated association having a membership of five thousand. It has no entity or existence apart from that of its members, although for convenience it is permitted that the group comprising the union be sued in the name adopted by the association. This is a procedural provision and does not in any way change the status of the group or its substantive liabilities. *United Mine Workers v. Coronado Coal Co.* 259 U. S. 344, 42 Sup. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762; *Taff Vale Case* (1901), A. C. 426, 70 L. J. K. B. 905. * * *"

CONCLUSION

It is respectfully contended that the judgment of the court below should be affirmed.

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APPENDIX

SUBCHAPTER III

Public Utilities

(Enacted in 1947, amended in 1949)

111.50 DECLARATION OF POLICY. It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employes which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employes, and to provide settlement procedures for labor disputes between public utility employers and their employes in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

111.51 DEFINITIONS. When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state; and shall be deemed to include a rural elec-

trification co-operative association engaged in the business of furnishing any one or more of such services or utilities to its members in this state. Nothing in this subsection shall be interpreted or construed to mean that rural electrification co-operative associations are hereby brought under or made subject to chapter 196 or other laws creating governing or controlling public utilities, it being the intent of the legislature to specifically exclude rural electrification co-operative associations from the provisions of such laws. This subchapter does not apply to railroads nor railroad employes.

(2) "Essential service" means furnishing water, light, heat, gas electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin employment relations board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

111.52 SETTLEMENT OF LABOR DISPUTES THROUGH COLLECTIVE BARGAINING AND ARBITRATION. It shall be the duty of public utility employers and their employes in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

111.53 APPOINTMENT OF CONCILIATORS AND ARBITRATORS. Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter.

No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the board by section 20.585 upon such authorizations as the board may prescribe.

111.54 CONCILIATION. If in any case of a labor dispute between a public utility employer and its employes, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employes are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

111.55 CONCILIATOR UNABLE TO EFFECT SETTLEMENT; APPOINTMENT OF ARBITRATORS. If the conciliator so named is unable to effect a settlement, of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continuation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute.

111.56 STATUS QUO TO BE MAINTAINED. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action, of either party without the consent of the other.

111.57 ARBITRATOR TO HOLD HEARINGS. (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in disputes. Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper inter-

pretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved;

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrators to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The overall compensation presently received by the employes having regard not only to wages for time actually worked but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stability of employment enjoyed by the employes. The foregoing enumeration of factors shall not be construed as precluding the arbitrator from taking into consideration other fac-

tors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

111.58 STANDARDS FOR ARBITRATION. The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

111.59 FILING OF ORDER WITH CLERK OF CIRCUIT COURT; PERIOD EFFECTIVE; RETROACTIVITY. The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit court of the county wherein the dispute arose or where the majority of the employes involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall continue effective for one year from that date, but such order may be changed by mutual consent or agreement of the parties. No order of the arbitrators relating to wages or rates of pay shall be retroactive to a date before the date of the termination of any contract which may have existed between the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were pre-

sented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be matter for collective bargaining or decision by the arbitrator.

111.60 JUDICIAL REVIEW OF ORDER OF ARBITRATOR. Either party to the dispute may within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review herein above set forth and shall affirm, reverse, modify or remand such order to the arbitrator as to any issue or issues for such further action as the circumstances require.

111.61 BOARD TO ESTABLISH RULES. The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this sub-chapter.

111.62 STRIKES, WORK STOPPAGES, SLOWDOWNS, LOCKOUTS, UNLAWFUL; PENALTY. It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employes when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to instigate, to induce, to conspire with, or to encourage

any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63 ENFORCEMENT. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 CONSTRUCTION. (a) Nothing in this subchapter shall be construed to require any individual employe to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this subchapter only to forbid employes of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

(b) All laws and part of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65 SEPARABILITY. It is hereby declared to be the legislative intent that if any provision of this subchapter,

or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

Effective Date: July 26, 1947.

269.56 DECLARATORY JUDGMENTS ACT. (1) Scope. Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

(2) Power to construe, etc. Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statue, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration or rights, status or other legal relations thereunder.

* * *

(11) Parties. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the right of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

(12) Construction. This section is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 302

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, ET AL., ETC.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, ET AL., ETC.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

BRIEF OF APPELLEE MILWAUKEE GAS LIGHT COMPANY

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BRIEF OF APPELLEE MILWAUKEE GAS LIGHT COMPANY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 302

ARTHUR ST. JOHN, CHESTER WALCZAK, AL FUHRMAN, ET AL., ETC.,

Appellants,

vs.

WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, ET AL., ETC.,

Appellees.

BRIEF OF APPELLEE MILWAUKEE GAS LIGHT COMPANY

This is an appeal from a judgment entered on June 14, 1950 in the United States District Court for the Eastern District of Wisconsin, Circuit Judge F. Ryan Duffy and District Judges Patrick T. Stone and Robert E. Tehan sitting, dismissing an action for a permanent injuction against the enforcement of Subchapter III of Chapter 111, Wisconsin Statutes, 1947, which is a public utility anti-strike law, and for a judgment declaring said subchapter void and repugnant to the United States Labor-Management Relations Act of 1947, and to the Constitution of the United States.

A like action had been commenced for like relief in the Circuit Court for Milwaukee County, Wisconsin on September 3, 1948. On January 6, 1949, a judgment was entered in the state court action holding the act valid and constitutional. That judgment was affirmed by the Supreme Court of Wisconsin on July 12, 1949.

In the action at bar, the defendants, after answering generally, pleaded the state court judgment as *res judicata.*

On April 28, 1950, the District Court sustained that defense and entered judgment dismissing the action.

OPINION BELOW

The opinion of the U. S. District Court for the Eastern District of Wisconsin, three judges sitting, is reported at 90 F. Supp. 347. It is printed at record pages 59-66, followed by a dissenting opinion at pages 67-75.

JURISDICTION

The judgment of the District Court was entered on June 14, 1950 (R. 84). The jurisdiction of this court is invoked under Section 1253, Ch. 81, Tit. 28, U.S.C.A.

STATUTES INVOLVED

Appellants' attack is centered on Subchapter III of Chapter 111, Wisconsin Statutes, 1947.

That has been referred to by the Wisconsin Supreme Court as the "public utility anti-strike law." (*Wisconsin Employment Relations Board vs. Milwaukee Gas Light Company, et al,* 258 Wis. 1, at 2, advance sheets, 44 N.W. (2d) 547, 548, advance sheets, now before this Court

(No. 438) for argument to follow the case at bar and two others.)

The act is printed in part in Appellants' Brief Appendix "A" at pages 18 to 20.

Appellants omit sections 111.50, declaration of policies; 111.57, arbitrator to hold hearings (which covers not only procedure but prescribes the affirmative standards); 111.58, two restrictions with reference to standards; 111.59, filing arbitrators' order with clerk of circuit court (note not with board); period effecting; retroactivity; 111.60, judicial review of order of arbitrator; and 111.61, board to establish rules.

We assume that the failure to print these sections means that they are not attacked. If they are valid, the act as a whole is valid.

This act is a subchapter of Chapter 111, which is entitled "Employment Relations."

We think that the act cannot properly be considered piecemeal, nor entirely out of its setting. In order that the court may have it available at one place, we print it in full as Appendix A in this brief.

QUESTIONS INVOLVED

1. Is the judgment appealable under Section 1253 in view of the fact that, as we submit, it neither grants nor denies either an interlocutory or a permanent injunction?

2. Had not the demand for an injunction been abandoned before the entry of the judgment?

3. Has not the entire controversy been settled, and is not this case now moot?

4. Had not the validity of the Wisconsin public utility anti-strike law and its binding effect on the plaintiffs become *res judicata* prior to the commencement of the action at bar under that certain judgment of the Circuit Court for Milwaukee County, Wisconsin entered on January 6, 1949, which was affirmed by the Supreme Court of Wisconsin in *United G., C. & C. Workers vs. Wis. E. R. Board,* 255 Wis. 154, 38 N.W. (2d) 692?

5. If the state court judgment be not conclusive under the doctrine of *res judicata,* would not the District Court, under the pleadings and the undisputed facts, have been compelled to enter the same judgment which it did in fact enter?

It would have been proper to discuss these questions in the order set forth. However, we think it more helpful to consider questions 4 and 5 at the outset in connection with our answer to the appellants' brief.

ARGUMENT

I.

THE ARGUMENT THAT THE STATE COURT JUDGMENT WAS ERRONEOUS AB INITIO AND COULD NOT BE RES JUDICATA PRESENTS NO FEDERAL QUESTION

This argument appears at pages 7 to 10 of Appellants' Brief. Reduced to its last analysis, the proposition contended for is that the Wisconsin courts erred in stating the Wisconsin law. That presents no federal question.

What is the correct procedure, so long as there is no denial of due process, is for the state, and presents no federal question.

We are unable to follow counsel in the statement that, when a court sustains a general demurrer, it says, in effect, that there is no controversy (p. 7). On the contrary it adjudicates a controversy.

At pages 8 and 9 counsel call attention to the judgments entered in the two state court actions; one in which the defense of *res judicata* was sustained, and one involving another utility (*Amalgamated Ass'n. of Street, E. R. & C. Employees vs. Milwaukee Electric R. & T. Co.,* 255 Wis. 163); and assert that "if the judgment in one case was erroneous, then the judgment in the companion case was erroneous" (p. 9); and that "the District Court based its decision of *res judicata* on what we believe to be an erroneous judgment. * * *" If there had been error, it would not have presented a federal question.

The place for its correction would have been in the state courts. But counsel should have directed the court's

attention to the fact that the Wisconsin Supreme Court has in three later cases approved the decision in the first Gas Company case.

Wisconsin E. R. Board vs. Amalgamated Asso., 257 Wis. 43, advance sheets, 42 N.W. (2d) 471;

Amalgamated Asso. vs. Wisconsin E. R. Board, 257 Wis. 53, advance sheets, 42 N.W. (2d) 477;

Wisconsin E. R. Board vs. Milwaukee G. L. Co., 258 Wis. 1, advance sheets, 44 N.W. (2d) 547, advance sheets.

If any federal question had arisen in the first of the Gas Company cases, it could have been presented on a review of the judgment therein in this Court. No such review was sought.

II.

THE VALIDITY OF THE WISCONSIN PUBLIC UTILITY ANTI-STRIKE LAW BECAME RES JUDICATA UNDER A STATE CIRCUIT COURT JUDGMENT WHICH WAS AFFIRMED ON APPEAL

To quote from *United States v. Munsingwear, Inc.*, 340 U. S. 36, at 38, advance sheets,

> "We start then with a case which falls squarely within the classic statement of the rule of *res judicata* in *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48-49:
>
> > 'The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and

> even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.' "

This question is discussed in Appellants' Brief under heading II at pages 11 to 14.

(a) A Declaratory Judgment, in Most Cases, is Intended to be Prospective in Its Operation.

There is no challenge as to identity of parties.

The only challenge is as to the identity of issues. That challenge is based solely on the ground that the complaint contains ten allegations which refer to "overt acts occurring nine months after the Circuit Court action was decided" (pp. 11 and 12). The answer is that the rights and duties of the parties existing whenever that state of facts might arise had already been adjudicated. A declaratory judgment, in most cases, is, and is intended to be, prospective in its operation.

Before entering upon this branch of the argument, it should be observed that this case was tried and submitted to the District Court on all the issues, of which *res judicata* was but one. *(Amended Complaint, R. 1-10; Answer of Milwaukee Gas Light Company, R. 10-30; Answer of State Official Defendants, R. 30-33; Stipulation as to Facts, R. 34-47).*

(b) District Court's Opinion Clear and Direct.

The reasons for sustaining the defense of *res judicata* are clearly and directly stated in the majority opinion by

Circuit Judge Duffy. The reasoning is, we think, unanswerable. It will be found a helpful introduction to a consideration of the case. (R. 59)

(c) Comparison of Pleadings in State and District Courts Demonstrates Identity of Issues.

The amended complaint herein opens with this statement:

> "1. This is a suit of a civil nature seeking an injunction *and a declaratory judgment,* and arises under the Constitution of and the laws of the United States." (R. 1.)

The prayer for judgment is that:

> "(d) That the court issue a permanent injunction enjoining and restraining the defendants and their agents from taking steps to enforce the penalties of sub-chapter 3, Chapter 111 of Wisconsin Statutes of 1947, or other provisions thereof, which interfere with the rights of the plaintiffs as citizens of the United States, and which are in conflict with the laws of the United States and the Constitution of the United States.
>
> "(e) This court issue a judgment declaring that the provisions of sub-chapter 3, Chapter 111 of the Wisconsin Statutes of 1947, insofar as they may be applied to penalize these plaintiffs and others for whom they are authorized to act, to compel them to submit to arbitration on any negotiable issue or which has for its purpose the punishment of the plaintiffs for having left their place of employment in concert or in agreement with others, or for having picketed the defendant company's premises, are void, illegal, unenforceable and repugnant to the United States Labor-Management Relations Act of 1947, and to the Constitution of the United States.

"(f) The plaintiffs have such other and further relief as to the court may seem just and equitable." (R. 12 and 13)

The granting of subdivision (e) of the prayer of the amended complaint in this action would be a condition precedent to the granting of any relief to the plaintiffs.

The defendants, in addition to putting in issue the allegations of the amended complaint, pleaded that the plaintiffs, prior to the commencement of the action at bar, chose as their forum for the litigation of the same issues, the Circuit Court for Milwaukee County, Wisconsin, in an action in which a *judgment* was entered declaring the statute valid, and denying relief sought in all other respects.

See Gas Company answer (R. 17, pars. 19 and 20, R. 20, and par. 22, R. 21 to 24).

The complaint in the state court action appears at Record pages 25 to 28.

The judgment therein appears at Record pages 28 to 30.

The identity of the issues will be apparent on a comparison of the complaints, and particularly the prayers, in the two actions.

The prayer for relief in the state court action reads as follows:

"*Wherefore* plaintiff prays that the court determine and declare the rights of the parties, and declare sub-chapter III of Chapter 111 of the Laws of 1947, Wisconsin Statutes, unconstitutional and invalid, and give such further relief as may be lawful, just and proper, by way of declaration of the rights of the parties." (R. p. 28)

(d) Scope of Wisconsin Declaratory Judgments Act and Scope of the Issues Tried in the State Court.

Under Wisconsin's declaratory judgments act, courts of record have "power to declare rights, status and other legal relations whether or not further relief is or could be claimed." The declaration may be "either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree." Any person whose "rights, status or other legal relations are affected by a statute * * * may have determined any question of construction *or validity* arising under the * * * statute * * * and obtain a *declaration of rights, status or other legal relations thereunder.*"

Sec. 269.56, Wisconsin Statutes.

A fuller quotation will be found in Appendix B, infra.

The plaintiffs in the state court asked relief under this declaratory judgments act.

In his decision therein, Circuit Judge Daniel W. Sullivan said:

> "The above entitled actions are brought pursuant to Section 269.56 Stats. for a declaration of the rights, status and legal relations of the parties under Chapter 414, Laws of 1947 (Sub. chap. III of Chap. 111, Stats.), relating to compulsory arbitration of labor disputes in public utility industries, and for a declaration that said Act is unconstitutional." (R. 48)

He also said:

> "The facts alleged satisfactorily show (1) a justiciable controversy, (2) adverse interests of the parties plaintiff and defendant, (3) a legally protectible interest on the part of each of the plaintiffs, and (4) that the issues are ripe for judicial determination. *State ex rel. LaFollette v. Dammann,* 220 Wis. 17." (R. 49)

Speaking of the plaintiffs' contentions, he said in part:

"Plaintiffs contend:

"1. That Chap. 414, Laws of 1947, violates the 'due process of law' and the 'equal protection of the laws' provisions of the XIV Amendment to the Constitution of the United States.

"2. That it likewise violat s the 13th Amendment in that it imposes 'involuntary servitude' upon the plaintiffs.

"3. That it impairs the obligations of contract, contrary to Sec. 10, of Article I.

* * *

"7. That the law is in conflict with the National Labor Relations Act, as presently amended (known as the Taft-Hartley Act).

* * *" (R. 51)

He closed with the direction: "*Judgments* may be entered declaring the rights and status of the parties in accordance with the foregoing." (R. 59)

(e) The Judgment in the State Court Covered All Issues in the Action at Bar.

The decision was filed on December 30, 1948 (R. 48).

The judgment, which was entered on January 6, 1949, omitting recitals and signature, reads as follows:

"It Is Hereby Adjudged and Determined that Chapter 414, Laws of 1947, being Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947, is a valid and constitutional act, and does not violate nor conflict with any of the provisions of the Constitution of the State of Wisconsin, nor with any of the provisions of the Constitution of the United States, nor with any amendment thereto, and does not conflict with the United States Labor-Management Relations Act of 1947, and does not deny to the plaintiffs

nor to any of the employees of the defendant Milwaukee Gas Light Company represented by them, and does not deprive them of, any rights, privileges or protection secured to them under either of said constitutions or said act of Congress; and that the plaintiffs, the defendant Milwaukee Gas Light Company, and its employees represented by the plaintiffs herein, are subject to and controlled by said Subchapter III of Chapter 111 of the Wisconsin Statutes, 1947.

"It Is Further Adjudged that the prayer of the plaintiffs in the above entitled action for further relief be and the same hereby is denied." (R. 29-30)

An appeal was taken from that judgment to the Supreme Court of the State of Wisconsin, and that court affirmed the judgment on July 12, 1949. It was a final judgment; and if any federal question could have been presented, it was subject to review by this Court. *No such review was sought; and it is just as final and conclusive as if it had been presented to this Court and affirmed.*

If that action had been commenced in the District Court, and that judgment had been entered, we submit that the District Court would not have entertained the present action. It would have been dismissed for the reason that the issues had already been adjudicated.

The only difference in the situation now presented is that that judgment was entered in the Circuit Court for Milwaukee County in the State of Wisconsin. That is a court of general jurisdiction. The District Court has no broader jurisdiction. That jurisdiction in Wisconsin is vested by the Constitution of that state; and even the Legislature is powerless to restrict it.

Had the case been tried originally in the District Court, and on the District Court record, a judgment cast in the

language of the State Court judgment would have been responsive to the pleadings and the record.

(f) The Validity of the First State Court Decision is Itself Res Judicata Under Later Decisions in the State.

The Wisconsin Supreme Court has reaffirmed its decision of July 12, 1949 in several different cases.

On May 2, 1950, the court said:

> "Since we *have held* in *United G., C. & C. Workers v. Wisconsin E. R. Board*, 255 Wis. 154, 38 N.W. (2d) 692, and *do now hold* the statute to be constitutional, the final contention of the defendants that the several sections thereof are not severable need not be determined." [Italics supplied]

Wisconsin E. R. Board v. Amalgamated Asso., 257 Wis. 43, at 52, advance sheets, 42 N.W. (2d) 471.

See also:

Amalgamated Asso. v. Wisconsin E. R. Board, 257 Wis. 53, advance sheets, 42 N.W. (2d) 477.

On November 8, 1950, the court said:

> "The union asserts that subch. III of ch. 111, Stats., conflicts with the Federal Labor Management Relations Act of 1947, 29 USCA, sec. 141 et seq., and violates the state and federal constitutions.
>
> "The constitutionality of the public utility anti-strike law was questioned in a previous action in this court. *United G., C. & C. Workers v. Wis. E. R. Board* (1949), 255 Wis. 154, 38 N.W. (2d) 692. *The law has been held to be a proper legislative enactment.*" [Italics supplied]

Wisconsin E. R. Board v. Milwaukee G. L. Co., et al, 258 Wis. 1, 44 N.W. (2d) 547, 550, advance sheets.

These decisions leave no room for debate as to the force and effect of the particular state court judgment relied upon in support of the defense of *res judicata*.

This last decision is itself *res judicata* as to the effect of the judgment involved in the first.

The latest of these is now before this Court as No. 438 on the current calendar, to be heard following the argument in the case at bar, and in two other cases involving another utility.

These decisions indicate the force and effect in Wisconsin *of this particular judgment*.

Under principles long recognized, the same force and effect would have been given thereto in the absence of any specific ruling.

(g) Former Judgment Conclusive on all Issues which might have been litigated.

The judgment in the former action is conclusive not only as to matters which were actually litigated therein, but as to matters which might have been litigated therein.

Werner v. Riemer, 255 Wis. 386-406, 39 N.W. (2d) 457-468, at 465, 466 (1949);

Kuchenreuther v. Chicago, M. St. P. & P. R. Co., 225 Wis. 613, 615, 275 N.W. 457 (1937);

Grunert v. Spalding, et al, 104 Wis. 193, 213, 214, 79 N.W. 606 (1899).

(h) Doctrine of Res Judicata in Wisconsin.

The doctrine of *res judicata* applies in Wisconsin.

Reinkey v. Wilkins, 172 Wis. 515, 520, 179 N.W. 751.

The doctrine of estoppel by record prevents a party, not only from litigating again what was actually litigated in the former case, but from litigating *what might have been litigated therein.*

Kuchenreuther v. Chicago, M., St. P. & P. R. Co., 225 Wis. 613, at 615, 275 N.W. 457 (1937).

The final adjudication is conclusive, in a subsequent action between the same parties, as to all matters which were litigated or *which might have been litigated* in the former proceedings.

Werner v. Riemer, 255 Wis. 386, at 403, 39 N.W. (2d) 457.

It is not necessary to rely merely on the full faith and credit clause of the United States Constitution. On general principles of *res judicata,* the District Court was bound by the judgment of the state court.

Angel v. Bullington, 330 U. S. 183, at pp. 192-193, 91 L. Ed. 832;

Treinies v. Sunshine Mining Co., et al, 308 U. S. 66, 75-78, 84 L. Ed. 85;

American Surety Co. v. Baldwin, 287 U. S. 156, 77 L. Ed. 231.

A prior judgment is a finality as to the claim or demand in controversy, concluding the parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 282, 90 L. Ed. 1231, 1239;

Grubb v. Public Utilities Comm., 281 U. S. 470, at 479, 74 L. Ed. 972.

And whether a particular issue was actually litigated is immaterial in view of the necessary conclusion that there was full opportunity to litigate it and that it was adjudicated by the decree.

Jackson v. Irving Trust Co., 311 U. S. 494, 503, 85 L. Ed. 297.

This is a field in which the doctrine of *res judicata* should have the most complete operation. If a judgment in an action for declaratory relief is not *res judicata* as between the parties, the statute providing therefor is an empty gesture.

Moreover, if a judgment in a class action is not *res judicata* as to the persons represented by a party or parties authorized to sue or defend and actually suing or defending in their behalf, then no such action ought to be permitted.

(i) Full Faith and Credit due to State Court Judgment.

The force and effect of the judgment in the State of Wisconsin having been determined, it must be accorded that same force and effect in all federal courts. As stated in the majority opinion in the District Court,

> "The full faith and credit clause of the United States Constitution (Art. IV, Sec. 1) applies to federal courts. 28 U.S.C. 7138. Federal courts are required to give full faith and credit to the judgments of State courts. *Davis v. Davis*, 305 U. S. 32, 39-40." (R. 66)

These considerations call for an affirmance of the judgment.

We submit, however, that on this record the same judgment would have been called for had the issue of *res judicata* not been in the case.

III.

THE WISCONSIN PUBLIC UTILITY ANTI-STRIKE LAW IS VALID

If this law is valid, then, for that reason alone, the judgment of dismissal should be affirmed.

If there had been no prior action, and if the District Court had found the law valid, a judgment cast in the form of the state court judgment would have been proper.

Counsel for appellants raises the questions whether this act violates the 13th and 14th Amendments to the Federal Constitution, and whether it is in conflict with the Labor-Management Relations Act of 1947 (Appellants' Brief, p. 4).

The purpose to press these questions is not wholly clear from the specification of errors (p. 6). Division II of the argument (pp. 11 to 14) is devoted to *res judicata.* Division I (pp. 7 to 10) deals with *res judicata,* but suggests going beyond that. Division III (pp. 14 to 17) discusses conflict with the federal law, in a measure at least, as though there had been no prior trial of the original issues.

This case was fully tried on an agreed statement of facts (R. 34) supplemented by one item of evidence, the decision of the trial judge in the state court action (R. 48 to 59). *There is no disputed fact.*

If the District Court had not sustained the defense of *res judicata,* or, if this Court were to take the view that the District Court erred on this point, we submit that the act was none the less valid and that, on the record as a whole, a judgment of dismissal (R. 85) would still have been called for. For that reason the judgment should be affirmed.

A.

Purpose of Law to Insure against Interruption of Essential Services and to Promote Public Safety as well as Service.

In 1939, Wisconsin enacted an "Employment Peace Act." In 1945, it enacted a "Fair Employment" act. These are Subchapters I and II of Chapter 111, which is entitled "Employment Relations."

In 1947 it added thereto Subchapter III under the title Public Utilities. It might well have been entitled Public Utility Employment Relations Act. The Supreme Court of the state has called it "the public utility anti-strike law."

Its purpose is clear. That purpose was to insure the public against any "interruption of the supply of an essential public utility service" (Sec. 111.50). To accomplish that purpose the state imposed on the parties to labor disputes in the public utility field the duty to resolve all such disputes by good faith collective bargaining, and by providing that, in the event of an impasse or stalemate, strikes and lockouts should be forbidden, and that the parties should first be required to resort to conciliation under the direction of the Wisconsin Employment Relations Board (created under Sec. 111.03 in Subchapter I); and that, in the event that the stalemate still

continued, they should be required to submit the dispute to arbitrators chosen from a list prepared by the Board. The award of the arbitrators, which is subject to judicial review (Sec. 111.60), is to be filed in the office of the clerk of the circuit court, and is to continue in force for a period of one year (Sec. 111.59).

Notwithstanding any award, the duty of the parties to attempt to resolve the dispute by agreement continues, and any agreement reached supersedes the award.

B.

Due Process Rights Inhere in the Individual; but Trial by Combat has no Constitutional Guarantee.

There runs through the theory of due process of law the idea that fundamentally a right belongs to an individual, *qua* individual. Thus, in the case of labor, the right which originally existed was the right of an individual laborer to contract as to the terms and conditions under which he would work. After the adoption of the Fourteenth Amendment, this right was translated into the idea of freedom of contract. It was early recognized, however, that the right to contract was a hollow right to the average laborer due to the inequality of his bargaining power as compared to that of his employer. Accordingly, it was soon recognized that individual laborers should be permitted to organize and to bargain as a group with the employer, in order to more nearly equalize the bargaining positions. Even this proved not to afford enough power to the laborers, and they were soon permitted to engage in such concerted activities as strikes, boycotts, and picketing to insure that they would be dealt with fairly. Thus, the original right to contract was bol-

stered by legal recognition of the right to carry on activities which would aid the effective exertion of the original right. It was this transition from an original right of an individual to contract to his right to engage in certain concerted activities with others which perhaps prompted Mr. Justice Brandeis in his dissenting opinion in *Duplex Company vs. Deering,* 254 U.S. 443, 488, 65 L.Ed. 349, (1921) to say:

> [254 U.S. 488] "Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat."

Certainly the right to picket peacefully comes under the protection of the Fourteenth Amendment, though, as will appear later, it may be confined in scope by a state, and we do not contend here that the right to strike is not ordinarily protected by that same amendment. cf. *N. L. R. B. vs. Fansteel Corp.*, 306 U.S. 240, 256, 83 L.ed. 627 (1939). What we do contend is, however, that, as Mr. Justice Brandeis suggests, there may arise such conditions

in a particular industry that those who engage in it "cannot continue their struggle without danger to the community." Where such dangers arise, it presents one of the instances where a reasonable exercise of the police power of a state may limit rights otherwise protected by the Fourteenth Amendment, such limitation being in the interests of the general welfare of the people which the state has been established to protect.

This gradual translation from an individual right of contract to group rights, which latter were recognized as necessary for the successful attainment of the object of the individual right, should not be considered as involved in the theory of involuntary servitude under the Thirteenth Amendment. The right to be free from the oppression of involuntary servitude resides in the individual, *qua* individual. It was inevitable that in their progress towards organization, laborers should have adopted the democratic process of majority rule in their trade unions. It could not seriously be suggested that the fact that the minority of a bargaining unit must by statute work under terms which are not to their liking imposes involuntary servitude. Just as the minority submit to the demands of the majority, so the entire unit must defer to the interests of the public. Involuntary servitude has remained an individual concept, and rightly so.

It cannot be stressed too strongly that *only the methods of trial by combat are prohibited by Subchapter III.* There is no conflict between this law and the provisions of the Labor-Management Relations Act of 1947 (hereinafter termed the "Taft-Hartley Law"). If the state may pass legislation prohibiting strikes without otherwise violating constitutional prohibitions, the Taft-Hartley Law does not limit such legislation. The right to bargain collectively is fully recognized. Thus, section

111.52, Wis. Stats., places a duty upon employers and employees to exert all reasonable efforts to settle disputes through collective bargaining. It is only when the processes of collective bargaining have reached an impasse and stalmate that provision is made for conciliation and arbitration. Section 111.50, Wis. Stats. In addition, the order of the arbitration board, which may be made only after an adequate hearing and from which judicial review is afforded, see section 111.60, Wis. Stats., may be supplemented by agreements between the parties and may be changed by similar agreements. Section 111.59, Wis. Stats.

C.

Certain Well Recognized Rights of Labor are not at Issue.

It is essential at the outset to narrow the scope of the questions at issue before the court. Certain rights of labor are not questioned here.

1. *Right to organize.* The right of workers to organize for a lawful purpose has not been questioned in this country since the middle of the nineteenth century.

Commonwealth vs. Hunt, 45 Mass. 111 (1842);

See

American Foundries vs. Tri-City Council, 257 U. S. 184, 209, 66 L.Ed. 189 (1921);

63 *C.J., Trade Unions,* §4;

4 *Restatement of Torts,* §§784-796.

Among those purposes is that of collective bargaining.

See

N. L. R. B. vs. Jones & Laughlin Steel Corp., 301 U.S. 1, 33, 81 L.Ed. 893 (1937).

2. *Right to Picket.* It is also well settled that peaceful picketing falls under the protection of freedom of speech afforded by the Fourteenth Amendment.

Thornhill vs. Alabama, 310 U.S. 88, 84 L.Ed., 1093 (1940);

American Federation of Labor vs. Swing, 312 U.S. 321, 85 L.Ed. 1145 (1941).

3. *Right to Strike.* The strike has long been recognized as a lawful weapon to be used by workers in their struggle for economic power.

See

American Foundries vs. Tri-City Council, 257 U.S. 184, 209, 66 L.Ed. 189 (1921);

Society of New York Hospital vs. Hanson, 59 N.Y.S. (2d) 91, 95 (N.Y. Sup. Ct. 1945);

4 *Restatement of Torts,* §797.

4. *Right to Contract.* It is not questioned that a group of individuals has a right to contract with an employer as to wages and terms and conditions of employment.

J. I. Case Co. vs. N. L. R. B., 321 U.S. 332, 336-339, 88 L.Ed 762 (1944);

Wolff Co vs. Industrial Court, 262 U.S. 522, 534, 67 L.Ed. 1103 (1922).

D.

What is at Issue is the Extent to which Particular Rights may be limited by the exercise of the State Police Power.

None of the four rights enumerated above is immune from legislative limitation. Thus, organizations must be entered for a lawful purpose.

> *Plant vs. Woods,* 176 Mass. 492, 57 N.E. 1011 (1900);

See

> *International Union vs. Wisconsin E. R. Board,* 250 Wis. 550, 563, 27 N.W. (2d) 875 (1947).

The state may limit the extent to which peaceful picketing may be carried on.

> *Giboney vs. Empire Storage and Ice Company,* 336 U.S. 490, 93 L.Ed. 834 (1949);
>
> *Carpenters and Joiners Union of America vs. Ritter's Cafe,* 315 U.S. 722, 86 L.Ed. 1143 (1942).

The purpose of a strike must be lawful.

> *Dorchy vs. Kansas,* 272 U.S. 306, 71 L.Ed. 248 (1926);
>
> *Arthur vs. Oakes,* 63 Fed. 310 (1894).

And the strike must not be furthered by unlawful means.

> *N. L. R. B. vs. Fansteel Corp.,* 306 U.S. 240, 83 L.Ed. 627 (1938).

Both the right to strike and the right to contract may be limited by a state in the interests of the general welfare. They are not absolute rights.

International Union, U.A.W., A.F. of L., Local 232 vs. Wisconsin E. R. Board, 336 U.S. 245, 93 L.Ed. 510 (1949);

Wolff Co. vs. Industrial Court, 262 U.S. 522, 534, 67 L.Ed. 1103 (1923).

See

Dorchy vs. Kansas, 272 U.S. 306, 311, 71 L.Ed. 248 (1926).

The basic question, therefore, is whether the prohibition of strikes and the requirement that disputes be submitted to arbitration in the public utility field is a valid exercise of the police power of the state, where the prohibition and the compulsion are limited, on the one hand, to situations in which a strike or slowdown would cause a stoppage of essential service, and, on the other hand, to situations where a continuation of the dispute would be likely in the judgment of the Wisconsin Employment Relations Board to lead to a stoppage of essential service.

E.

Dangerous Consequences of Stoppage of Essential Public Utility Services.

Subchapter III defines "essential service" as the furnishing of—

> "* * * water, light, heat, gas, electric power, public passenger transportation or communication * * * to the public * * *" [111.51(2), Wis. Stats.]

It requires no stretch of the imagination to comprehend the calamitous results of a stoppage of any of the essential services enumerated above.

Many cities are dependent for their *water supply* on privately owned utilities. If such a plant were compelled

to cease operation, citizens would be wholly deprived of drinking water, or be compelled to drink unsanitary water; sewage facilities would be practically eliminated; most foods could not be prepared; health would deteriorate due to the inability to maintain cleanliness, sterilization or adequate sewage disposal; heating facilities, a large number of which depend on hot water or steam, would become unusable; and steam-driven machinery would become idle.

For the purposes of illustration of the effects of the interruption of *gas service,* we take the situation presented in connection with the Milwaukee Gas Light Company. In the Milwaukee area it is the exclusive agency for the production and distribution of gas and the service of gas-consuming appliances. The total franchise area served exceeds 500 square miles. The municipalities served are the citizens of Milwaukee, West Allis, Wauwatosa, West Bend, Port Washington, Hartford, and the villages of Shorewood, West Milwaukee, Whitefish Bay, River Hills, Fox Point, Butler, Menomonee Falls, Grafton, Slinger, Thiensville, Germantown, Saukville and Jackson, and the townships between Milwaukee and the out-lying cities and villages. The total population of the area served is nearly 800,000. The number of customers exceeds 200,000. (R. 39-40)

When the Union orders the men out, the Company is faced with an emergency which it can meet only by an effort to maintain the gas pressure in the mains, and by asking gas users to shut off their meters. That becomes necessary because the Company has been deprived of all power to direct the men upon whom it would ordinarily depend for that service. If the strike continues, the service may be interrupted for weeks, and possibly months. There will be constant danger of explosions.

If the gas be shut off for a substantial period, service to every meter must be cut off. It cannot with safety be turned on again without checking at every meter, and beyond it to every gas appliance served through it. Every pipe must be purged of air. That operation would take weeks, and, in many cities, months. In the meantime, the users would be deprived of fuel. Homes are not equipped with any substitute. That means starvation to many. How many infants, invalids and aged might perish it would be hard to estimate. Hospitals would be as helpless as homes and industrial plants. *There is no difference in the consequences between this and the destruction of a gas plant by a bomb dropped by an enemy plane.* Those who enter the employ of the utility take over the duty of guarding the plant and the users. A strike may be as serious as an act of war. If some desperate character, by stealth, were to destroy such a plant, he would be prosecuted as a criminal. *The deaths resulting from the cutting off of service by any other means would be just as real.*

The seriousness of the situation presented in connection with the strike involved in the action at bar is indicated by the following language which appears in the opinion of the Supreme Court of the State of Wisconsin in the contempt action which grew out of that strike:

> "At 11 a.m. the public was advised to curtail consumption of gas and an appeal to consumers of gas was made to shut off the service; the steam pressure dropped to zero in the boiler room and no further pumping could be done with the main pumping facilities; the fires had to be pulled from the boilers reducing the steam pressure, and all facilities had to be stopped; a minimum pressure in the distribution system was kept in order that the air would not get into the mains so as to prevent any explosions due to the mixture of gas and air in the distribution sys-

tem; the send-outs dropped to twenty-five percent of what they had been previously. Low pressure in the system created a dangerous condition fraught with the possibility of infinite injury to the public. The public was advised by radio broadcasts and through the newspapers to shut off appliances and to shut off the service at the meter. The service was no. resumed until October 6, 1949."

Wisconsin E. R. Board v. Milwaukee G. L. Co., 258 Wis. 1, 44 N.W. (2d) 547, advance sheets (No. 438 in this Court).

A strike in an electric power utility may cripple factories dependent upon electric power, public water departments, sewage disposal plants, street lights, traffic control signals, fire and police alarms, street cars and trackless trollies, booster pumps for fire protection, and many other facilities.

The court may take notice of what may occur in any metropolitan area—

If *gas service* should be stopped, cooked food and hot water would be unknown in many homes and even in hospitals; a large number of homes would be without heat; most foundries and many other factories would shut down for lack of heat processes; gas refrigeration would be impossible; and, due to the inability of the utility to furnish men to service the countless individual gas outlets, an ever present danger of explosions would exist.

If *electric power* were to be cut off, most machinery would become idle; a major part of the transportation system would become useless; many dependent on electricity for cooking and water heating would be unable to prepare foods and would be without hot water; lighting facilities would be eliminated everywhere, with par-

ticularly serious results in hospitals and similar critical places; most refrigeration would be impossible; tall office buildings would close for lack of elevators; the water supply to those dependent on booster pumps for pressure would be reduced or cut off; proper sewage disposal would be impossible; hot-air heating devices dependent on forced drafts, as well as oil-burning furnaces and stokers, would be useless; communication systems would be cut off; and numerous other species of public paralysis would result.

If the *public transportation* of any area were to come to a standstill, the normal activities of that area would come virtually to a standstill with it; countless man hours would be lost, and with them the wages on whose continuity the majority are dependent for their livelihood; industries, including the other public utilities, would be compelled to curtail their operations, and might be compelled to shut down entirely, thus tending to cause the very stoppages of other essential service which this law is designed to prevent; and private facilities for transportation would be swamped by the use of such facilities by all who were able to do so.

Finally, the cutting off of means of communication would cause serious dangers to health and safety in a society which is adjusted to and consequently dependent on modern means of communication. For example, since medical advice can be given by telephone, the doctor is able today to take care of a much greater load of patients because of the telephone than he was able to do before its use became widespread. Another example would be the impossibility of placing police, fire, ambulance or other emergency calls. Other examples can be readily brought to mind.

Accordingly, each of the services covered by the act is vital to the public, some absolutely necessary for public health and safety, others less necessary in that regard, but none the less necessary for the proper functioning of the society which it is part of the state's business to preserve, and those latter singular in the widespread hardships which their cessation causes.

F.

There is no Deprivation of Liberty without due Process of Law.

In the preceding section we have outlined the serious consequences to the public caused by a cessation of the service of any or all of various public utilities. It seems desirable to emphasize again that strikes are prohibited and arbitration compelled only where the strike will result in a stoppage of such service, and where the continuation of the dispute is likely to cause such a stoppage. It is against that background that this law must be considered.

1. Standards Under Which Due Process Is Determined.

There are certain well-recognized principles governing the determination of whether particular legislation is within the bounds of the due process clause of the Fourteenth Amendment. Thus, it is well settled that the police power may be exerted by state legislation, even though the effect may be to invade rights guaranteed by the Fourteenth Amendment, when such legislation bears a real and substantial relation to the public health, safety, and general welfare.

See

Louis K. Liggett Co. vs. Baldridge, 278 U.S. 105, 111-112, 73 L.Ed. 204 (1928).

It is also well settled that the legislature has a large discretion in determining what measures are necessary for protection of the public interest, and that legislation will be invalidated only when it is "plain and palpable" that it has no substantial relation to the protection of the public health, safety, and general welfare.

See

Lawton vs. Steele, 152 U.S. 133, 136, 38 L.Ed. 385 (1894);

Thomas Cusack Co. vs. Chicago, 242 U.S. 526, 531, 61 L.Ed. 472 (1917).

2. Application of Due Process Standards to this Act Leaves No Doubt as to its Constitutionality.

The problem of whether the Wisconsin law offends the due process clause of the Fourteenth Amendment is a dual one. In the first place it will be assumed, *arguendo,* that the right to strike is protected by the Fourteenth Amendment. Secondly, it is well settled that freedom of contract is one of the liberties which may not be taken away without due process of law. The prohibition of strikes and the requirement that disputes be submitted to arbitration will be taken up in that order.[1]

---

[1] As a matter of organization, we treat the due process problem as a single problem with a dual aspect. We do not mean to infer that the no-strike provisions of Subchapter III and the compulsory arbitration provisions are not separable. We submit, without discussion, that they are.

(a) *There is no deprivation of the right to strike without due process of law.*

The lower court recognized that public utilities may be regulated virtually as an arm of the state. This need not be elaborated more than by pointing to Chapter 196 of the Wisconsin Statutes in which the rights and privileges of investors are subordinated to the public need. But in their refusal to recognize that the employees of public utilities may be treated as a special class, the appellants seem to ignore the considerations which require special treatment of the utilities themselves. Such treatment is based on the essential nature of the services performed by public utilities, services essential to the preservation of the health, safety and general welfare of the people.

Because its services are essential to the public, a public utility may be compelled to continue in operation.

Sec. 196.03, Wis. Stats.;

Madregano vs. Wisconsin Gas & Electric Co., 181 Wis. 611, 619, 195 N.W. 861 (1923);

State vs. Missouri Southern R. Co., 279 Mo. 455, 214 S.W. 381 (1919);

Missouri Pacific R. Co. vs. Kansas, 216 U.S. 262, 279, 54 L.Ed. 472 (1910);

51 *C.J., Public Utilities,* §98.

The public utility is certainly an industry where—

"* * * * the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied of entering the business either as owner or worker."

See

Wolff Co. vs. Industrial Court, 262 U.S. 522, 541, 67 L.Ed. 1103 (1923).

If the state may compel the continuous operation of the utility as against the owners, it would seem that it can insure its continuous operation by forbidding the employees of a public utility from concertedly engaging in activities which cause a stoppage of service to the public. This argument was put in stronger words by Mr. Chief Justice White in *Wilson vs. New*, 243 U.S. 332, 61 L.Ed. 755 (1917), when he said, at page 351:

> "* * * And finally, to what dersion would it not reduce the proposition that government had power to enforce the duty of operation, if that power did not extend to doing that which was *essential* to prevent operation from being completely stopped. * * * [Emphasis supplied]

To paraphrase the words of Chief Justice White:

If the state may say to the utility: "You have no right to strike," certainly it may say to the employees of the utility: "You have no right to strike."

The relation of patients in a hospital to the employees of the hospital is analogous to the relation of the general public to the employees of a public utility. Like the patient, the general public is dependent on those employees for its health and safety.

In *Society of New York Hospital vs. Hanson*, 59 N. Y.S. (2d) 91 (N.Y. Sup. Ct. 1945), aff'd 73 N.Y.S. (2d) 835 (App. Div., 1947), Judge Pecora enjoined the employees of a charitable hospital from striking to obtain higher wages He did so on the ground that, in the case of a hospital, the policy of favoring the right to strike

is outweighed by considerations of the public welfare, since the result of such a strike is to cause peril of health and safety.

In this connection, a further quotation from *Wilson v. New,* 243 U.S. 332, 352, L.Ed. 755, seems applicable:

> "* * * whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest * * *"

Though not analogous on its facts, the recent case of *Giboney vs. Empire Storage and Ice Company,* 336 U.S. 490, 93 L.Ed. 834 (1949) indicates the present day attitude toward state limitations on the use by a union of its industrial weapons. The Empire Company had refused to agree with the Ice and Coal Drivers Union not to sell ice to non-union peddlers. Such a contract would have been a violation of the anti-trust laws of the State of Missouri and would have subjected the Company to treble damage liability to non-union peddlers. The Union peacefully picketed the Company's place of business. Injunctive relief granted by the courts of Missouri was unanimously upheld by the United States Supreme Court, even though the court recognized that picketing is a form of communication protected by the Fourteenth Amendment as an exercise of free speech.

See also

Carpenters and Joiners Union vs. Ritter's Cafe, 315 U.S. 722, 86 L.Ed. 1143 (1942).

How meager was the interest of the public in the limitation there upheld, when compared to the interest of

the public in limiting the ability of groups of employees to cause a stoppage in the essential service of a public utility, the calamitous results of which we have outlined at pages 25 to 30, supra. How much greater, too, is the interest of the public here than were the considerations of the general welfare which motivated this Court in sustaining comprehensive zoning legislation with its drastic restrictions on the use of private property, restrictions which, but for the dominant interests of the public, would have violated the Fourteenth Amendment.

See

Euclid, Ohio & Ambler Realty Co., 272 U.S. 365, 394-396, 71 L.Ed. 303 (1926).

(b) *Compulsory arbitration is not a deprivation of freedom of contract without due process of law.*

What has been said concerning the reasonableness of the prohibition of strikes in public utilities is applicable to the direction that disputes shall be arbitrated, and need not be repeated here. As has been pointed out, the statute by its terms prohibits strikes and compels arbitration only where a stoppage of essential service will, or is likely to result.

Mr. Justice Holmes, in the course of his dissenting opinion in *Adkins vs. Children's Hospital*, 261 U.S. 525, 570, 67 L.Ed. 785 (1923), said:

> "The criterion of constitutionality is not whether we believe the law to be for the public good. We certainly cannot be prepared to deny that a reasonable man reasonably might have that belief in view of the legislation of Great Britain, Victoria and a number of the States of this Union. * * *"

Compulsory arbitration has long been in effect in all of the Australian states, with the exception of Tasmania and Victoria, and in New Zealand and New South Wales strikes are forbidden in public utilities.

See

Witte, Experience with Strike Legislation Abroad, Annals of the American Academy, 248:138, Nov. 1946.

Ten of the United States have enacted compulsory arbitration laws in the public uitlity field. See Appendix B, infra. On such a record, how can it be said that no reasonable man could consider such legislation "for the public good."

In *Wolff Co. vs. Industrial Court,* 262 U.S. 522 at 534, 67 L.Ed. 1103, the court recognized that, like the other liberties protected by the Fourteenth Amendment, freedoom of contract is subject to a variety of restraints, which, to be valid, must not be arbitrary or unreasonable. There the court unanimously declared unconstitutional a Kansas compulsory arbitration law as applied to a labor dispute in a meat packing concern. In so doing, the opinion left open for future consideration the very legislation concerned here. At page 541, Mr. Chief Justice Taft made the following statement, a part of which we have previously quoted:

> "• • • In (sic) involves a more drastic exercise of control to impose limitations of continuity growing out of the public character of the business upon the employee than upon the employer; and without saying that such limitations upon both may not be sometimes justified, it must be where the obligation to the public of continuous service is direct, clear and mandatory and arises as a contractual condition express or implied of entering the business either as owner or worker. • • •"

We have already shown that, in the case of a public utility, the "obligation to the public of continuous service is direct." It would not seem necessary to make an argument that a worker makes an "implied" contract with the public when he enters the employ of a public utility, since the expression is but another way of saying that the public may impose a duty on such a worker to settle his disputes peacefully, when not to do so would be to subject the public to peril. That such an obligation may reasonably be imposed in the limited manner of the Wisconsin Act seems to follow from a consideration of the dependence of the public on the service of the public utilities concerned. As Professor Simpson has stated in his article, *Constitutional Limitations on Compulsory Industrial Arbitration,* 38 Harv. L. Rev. 753, 775-776:

> "* * * In the first place, legislation providing for compulsory abritration would seem clearly valid as applied to the public utility industries. These industries supply services of vital importance to the public. * * * It is certainly neither arbitrary nor unreasonable to impose on the employees of such a company a duty not to quit work in concert, but to allow their disputes to be settled by compulsory arbitration * * *."

If the requirement for compulsory arbitration is reasonable in itself, how much more reasonable is it when offered as an alternative to and in lieu of a forbidden strike, with all the serious consequences which such a strike must have. The serious consequences of a stoppage of railroad service were before this Court in *Wilson v. New,* 243 U.S. 332, 61 L.Ed. 755 (1917). Mr. Chief Justice White said in concluding his opinion:

> [243 U.S. 359] "Being of the opinion that Congress had the power to adopt the act in question,

whether it be viewed as a direct fixing of wages to meet the absence of a standard on that subject resulting from the dispute between the parties or as the exertion by Congress of the power which it undoubtedly possessed to provide by appropriate legislation for compulsory arbitration—a power which inevitably resulted from its authority to protect interstate commerce in dealing with a situation like that which was before it—we conclude that the court below erred * * *."

Here we submit that the power of the Wisconsin Legislature to provide for compulsory arbitration to settle labor disputes in public utilities where a stoppage of essential service is threatened "inevitably" results from its authority to protect the health, safety and general welfare of its citizens.

State vs. Traffic Telephone Workers Federation of New Jersey, 142 N.J. Eq. 785, 61 Atl. (2d) 570, 573-4, (1948).

G.

The Law does not Impose Involuntary Servitude on Public Utility Employees.

Section 111.64, Wis. Stats., specifically limits the application of the law in question to workers leaving their jobs in concert.

"Nothing in this subchapter shall be construed to require any individual employee to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. * * *"

The legislature has thus directed the manner in which the statute is to be construed, and it is submitted that

such a mandatory construction forecloses any argument that the statute imposes involuntary servitude.

See

International Union vs. Wisconsin E. R. Board, 250 Wis. 550, 561-563, 27 N.W. (2d) 875 (1947).

In *People vs. United Mine Workers,* 70 Colo. 269, 201 Pac. 54 (1921), the court said at page 56:

> "There is no involuntary servitude under this act. Any individual workman may quit at will for any reason or no reason."

And in *Society of New York Hospital vs. Hanson,* 59 N.Y.S. (2d) 91, where a strike of hospital employees was enjoined, Judge Pecora was careful to state, at p. 97:

> "* * * Such an injunction will not, and cannot, trespass upon the right of the individual to quit his work,—for to give it such effect would be tantamont to giving abhorent sanction to peonage. It is aimed only at concerted activities to bring about and support a strike."

No more is there involuntary servitude under Subchapter 3 of Chapter III than is there involuntary servitude in *the compulsion upon the minority of workers, union or non-union, in a bargaining unit to work under terms agreed upon by the majority.* Such compulsion is effected by virtue of Section 2 of the *Railway Labor Act,* 45 U.S.C.A. §152; Sections 9 and 10 of the *National Labor Relations Act* as amended by the Taft-Hartley Law, 45 U.S.C.A. §§159, 160; and Section 111.06 of the Wisconsin Statutes.

See

Medo Corp. vs. Labor Board, 321 U.S. 678, 683-685, 88 L.Ed. 1007 (1944).

Indeed, Section 10(1) of the Taft-Hartley Law, 45 U. S. C. A. §160(1), permits *injunctiive relief in a federal district court to restrain the minority of the workers in a collective bargaining unit from striking for the purpose of compelling their employer to bargain with them.* The answer to a contention of involuntary servitude there is that any worker is free to quit if he is unsatisfied. That answer is just as true here.

> *State vs. Traffic Telephone Workers Federation of New Jersey,* 142 N.J.Eq. 785, 61 Atl. (2d) 570, 575 (1948).

It is suggested in *Wolff Co. vs. Industrial Court,* 262 U. S. 522 ,541, 67 L.Ed. 1103, that the position of workers in a public utility might be analogized to the enlistment of soldiers and sailors in military service. In that case the court said:

> [262 U. S. 541] " * * * It [the obligation of continous service] can only arise when investment by the owner and entering the employment by the worker create a conventional relation to the public somewhat equivalent to the appointment of officers and the enlistment of soldiers and sailors in military service." [Bracketed portion supplied]

Indeed no better way for an invading enemy to cripple a region could be suggested than by cutting off its gas, electric, water, transportation and communication services. Thus, it can be said, in a very real sense, that the workers in such utilities are as much guardians of the public safety as would be military personnel. The cases are numerous holding that compulsory military service does not impose involuntary servitude and in *Roberston vs. Baldwin,* 165 U. S. 275, 41 L.Ed. 715 (1897), it was held not to be in-

voluntary service to compel an ordinary seaman in the maritime trade to remain with his ship until the completion of the voyage for which he had signed on. If this analogy were pressed to the limit, it might be argued that the state could compel an individual worker to continue at work in a public utility until adequate provision had been made for his replacement. For the purpose of this argument, however, the analogy need be stressed only to illustrate by comparison how slight is the restraint on the individual's leaving his employment when compared to the weighty considerations which motivated the passage of Subchapter III.

Professor Simpson in *Constitutional Limitations on Compulsory Industrial Arbitration,* 38 Harv. L. Rev. 753, 783-785, takes the position that no problem of involuntary servitude arises in compulsory arbitration statutes, and gives the following illustration:

> "* * * Thus it could hardly be contended that a law forbidding railway employees from leaving their jobs while actually operating trains between stations would be invalid as imposing involuntary servitude. See *Freund, Police Power,* §452."

The operation of a railroad is thus analogized to the operation of a utility. Just as a state could forbid the abandonment of a train in the course of a regular run, so it can forbid the abandonment of a utility in such a way as to stop its operation and cause hardship to those dependent on that operation for their health and safety.

In *Butler vs. Perry,* 240 U. S. 328, 60 L.Ed. 672 (1916), a Florida statute, providing for compulsory labor on county roads and making a failure to work a misdemeanor, was attacked on the ground that it imposed involuntary servitude in violation of the Thirteenth Amendment. This

Court held that the statute did not impose involuntary servitude. The Court noted that the involuntary servitude provisions of the state and federal constitutions were framed in the language of the Ordinance of 1787, and that a provision for compulsory labor on highways was adopted by the Territorial Legislature as early as 1792. At that time there was a paramount necessity that roads be built and maintained. There is an equal necessity today that the services of public utilities be continuous, if the State is to be able to protect the health and the lives of its citizens. Mr. Justice McReynolds, recognizing the essential nature of some services, stated at pages 332-333:

> "* * * the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of *essential* powers. * * *" (Emphasis supplied)

Compare the language of Chief Justice White in *Wilson vs. New*, quoted above on page 33 of this brief.

In the final analysis, the worker who goes out on strike does not purport to be exercising his right to leave his employment and seek work elsewhere. He does not intend to give up his job by striking, and, in fact, he may not be discharged for going out on strike. 29 U. S. C. A. 152(3), 158; Secs. 111.02(3), 111.06(1), Wis. Stats. He desires merely to coerce his employer by economic pressure, and permanent severance of employment is the last thing sought by the strikers, individually or collectively.

A statute which forbids a strike is not, therefore, directed at compelling a continuance of employment repugnant to the individual employee, i.e., servitude. It is directed at preventing cessation of work under a continuing employment relationship.

See

N. L. R. B. v. Mackay Radio & Telegraph Co., 304 U. S. 333, 347, 82 L.Ed. 1381 (1938).

Much of the appellants' argument as to involuntary servitude seems to be based on the idea that this law aims at any concerted cessation of employment. They seem to suggest that a group of employees leaving their jobs permanently to take up work in other industries would be subject to the prohibitions of the law. This argument ignores the very intent of the Act as expressed in Section 111.64, Wis. Stats.:

> " * * * It is the intent of this subchapter only to forbid employees of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, * * * where such acts would cause an interruption of essential service."

Only stoppages under a continuing employment relationship are affected, and then only where the stoppage would cause an interruption of essential service. Prohibition of such stoppages does not impose involuntary servitude.

State vs. Traffic Telephone Workers Federation of New Jersey, 142 N.J. Eq. 785, 61 Atl. (2d) 570, 575.

H.

The Law does not Deny to Public Utility Employees the Equal Protection of the Laws.

It is well settled that the "equal protection" clause of the Fourteenth Amendment protects persons only against arbitrary and unreasonable classifications by state legislatures.

See, e. g.

Tigner vs. Texas, 310 U. S. 141, 146, 147 84 L. Ed. 1124 (1940).

It seems clear that selection of public utility employees for special treatment is eminently reasonable, just as it is reasonable to treat the public utility itself as belonging in a special category for the purposes of regulation.

Munn vs. Illinois, 94 U. S. 113, 24 L.Ed. 77 (1877).

In *Radice vs. People of the State of New York,* 264 U. S. 292, 68 L.Ed. 690 (1924), a New York Statute limiting hours of employment of women in restaurants was sustained against a contention that the statute denied equal protection, since it excepted women employed in hotel restaurants and employees' lunch rooms.

See also

Miller vs. Wilson, 236 U. S. 373, 382, 59 L.Ed. 628 (1915).

(hours of work of women employed in hotels regulated, but employees of boarding and lodging houses excepted);

Bosley vs. McLaughlin, 236 U. S. 385, 394-396, 59 L.Ed. 632 (1915)

(limiting hours of work of women pharmacists and student nurses in hospitals, but excepting graduate nurses).

For a review of cases, see the comprehensive note of Mr. Justice Brandeis dissenting in

Louisville Gas & Electric Co. vs. Coleman, 277 U. S. 32, 42, 72 L.Ed. 770 (1928).

A contention of denial of equal protection was met by Mr. Chief Justice White in *Wilson vs. New,* 243 U. S. 332, 354, 61 L.Ed. 1103 (1917), in the following way:

> "* * * The second rests upon the charge that unlawful inequality results because the statute deals not with all, but only with the wages of employees engaged in the movement of trains. But such employees were those concerning whom the dispute as to wages existed growing out of which the threat of interruption of interstate commerce arose,—a consideration which establishes an adequate basis for the statutory classification."

I.

To Provide in Legislation Enacted for the Protection of the Public the Sanction of State Enforcement and to Reject Enforcement by a Party in Interest Marks a Return to Due Process.

Throughout history, we have seen the necessity of curbing monopolies of wealth. No monopoly of wealth has ever been edured for a great period of time by any intelligent people. It tends to fall of its own weight. We are in

the midst of a new movement, looking toward monopoly of man power. That carries in its train possibilities for evil just as great. In its immediately destructive force, it may be far more devastating. It is not in the nature of mankind to endure it or to tolerate it.

In some states labor unions are expressly exempted from the operation of the statutes directed against monopolies. Secs. 133.04 and 133.05, Wis. Stats., If an express exemption was necessary, then, by a repeal of the exemption they may be subjected to those laws. If they may be subjected to such laws, then their activities may be controlled by restrictions of a less stringent nature. An act limited to the classes whose activities are capable of direct injury to the public, and requiring them to submit to arbitration, and restricting them in the use of the strike, is a salutary measure short of condemnation. This act of the *legislature* may well be deemed a storm signal of the possible extension of the monopoly statutes.

All out war against noncombatants is not constitutionally fostered or protected.

It is fundamental in our law, as traced to England, that the state, through its courts, resolves disputes by judgment, and through its sheriff, aided, when necessary by the *posse comitatus,* executes the judgment. Viewed from the standpoint of remedial law, that is due process.

When the state sets up the labor union, giving it the power to bargain, and, because of its virtual veto on dissenting views, the power to decide the dispute, and, in effect, the power to enforce its decree by its picket line—its own *posse comitatus*—there is an abandonment of due process as known to the common law.

What the state is now doing is resuming the power to adjudicate a dispute, and to enforce its judgment by its executive officers. That is to reinstate due process.

In *Giboney vs. Empire Storage & Ice Co.*, 336 U. S. 490, 93 L.Ed. 834 (1949), it was held that an injunction restraining a union of ice drivers from peacefully picketing an ice company in an effort to compel the company to stop selling ice to nonunion peddlers whom the union had sought to organize with a view to bettering wage and working conditions of the peddlers, was valid as enjoining an offense against a Missouri antitrust law, and not invalid as abridging the right of freedom of speech guaranteed by the Fourteenth Amendment. The court said:

> "While the State of Missouri is not a party in this case, it is plain that the basic issue is whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on in Kansas City, Missouri. Missouri has by statute regulated trade one way. The appellant union members have adopted a program to regulate it another way. The state has provided for enforcement of its statutory rule by imposing civil and criminal sanctions. The union has provided for enforcement of its rule by sanctions against union members who cross picket lines. See Associated Press vs. United States, 326 U. S. 1, 19; Fashion Guild vs. Trade Comm'n, supra, at 465; Addyston Pipe &Steel Co. vs. United States, 175 U. S. 211, 242. We hold that the state's power to govern in this field is paramount, and that nothing in the constitutional guaranties of speech or press compels a state to apply or not to apply its antitrade restraint law to groups of workers, businessmen or others. Of course this Court does not pass on the wisdom of the Missouri statute. We hold only that as here construed and applied it does not violate the Federal Constitution."

IV.

A SOUND PUBLIC POLICY AIMED AT THE PROTECTION OF THE NON-COMBATANT PUBLIC IS DEVELOPING THROUGH LEGISLATIVE ACTION AND JUDICIAL ADMINISTRATION

The power of the sovereign, state or nation, to enjoin a strike where public health and safety are endangered is, we think, established by the decision in *United States v. Mine Workers,* 330 U. S. 258, 91 L.Ed. 884 (March 6, 1947).

The following of the United States have enacted compulsory arbitration laws in the public utility field: Florida, Indiana, Kansas, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, Pennsylvania and Virginia. A similar law has been enacted in Hawaii.

These are tabulated in Appendix C herein.

In *State vs. Traffic Telephone Workers Fed. of New Jersey,* 142 N.J.Eq. 785, 61 A2d 570 (1948), Vice Chancellor Bigelow said:

> "The Union suggests that there is an inherent or constitutional right to strike, a right beyond the reach of the State. I know of no such right when the strike will cause great injury to the public. In my opinion, the adoption of the Union's view in this respect might lead to national disaster."

In *State vs. Traffic Telephone Workers' Federation of New Jersey,* 2 N.J. 335, 66 A.2d 616 (May 26, 1949), Chief Justice Vanderbilt, reviewing the foregoing decision, in a very enlightening opinion, said:

> " * * * Where by reason of a strike, work stoppage or lockout the flow of the services of any of these es-

> sentials of community life is halted or impaired, the state has not only the right but a pressing duty to step in and prevent the continuance of such stoppage or impairment and to take appropriate measures to restore them. If instead of a stoppage or curtailment of essential services there is an imminent danger of their being halted or curtailed, the State has the right as well as the obligation of preventing the occurrence of any such catastrophe." (Citing *U. S. v. United Mine Workers,* supra.)

He held the act involved in that case to be unconstitutional for lack of the prescription of definite standards in delegating legislative authority; but in so doing pointed out that this had been anticipated in similar legislation in other states, including Wisconsin. It is clear from his opinion that, if he were passing on the Wisconsin law, he would have upheld it.

After an amendment, the New Jersey statute was upheld in *New Jersey Bell Tel. Co. vs. Communications Workers, etc.,* ..... N.J. ....., 75 A.2d. 721, decided October 2, 1950 This decision is very carefully worked out, and is particularly interesting for its discussion of the relationship between the state act and the Taft-Hartley Act.

The last decision in New Jersey was cited and quoted in *Wisconsin Employment Relations Board vs. Milwaukee Gas Light Company,* 258 Wis. 1, 44 N.W. (2d) 547, decided on November 8, 1950, which is No. 438 on the current calendar.

A Michigan act of the same general character was held bad on other grounds in *Local 170 Transport Workers Union vs. Gadola,* 322 Mich. 332, 34 N.W. (2d) 71, decided September 8, 1948. However, the court clearly indicates the view that, but for the objection already mentioned, not here present, the act would have been upheld.

V.

THE WISCONSIN LAW IS NOT IN CONFLICT WITH THE TAFT-HARTLEY ACT

The basis for congressional action is the interstate commerce clause. Its express purpose is to protect the free flow of interstate commerce. Congress has no power to police the states' control over their utilities. That power rests with the states. In fact, the states exercise such powers on the theory that the utilities are state agencies. They perform functions which the states might perform directly rather than through agencies to which they delegate their own powers. We respectfully submit that Congress can exercise no more control over a state public utility agency than it could over the state itself.

Grant that Congress may take proper measures to insure the flow of commerce. Its powers end there. It has no police power, pure and simple. It cannot dictate to the state how its police power over its own utilities shall be exercised.

Nor can there be any no man's land in which there can be no control. The federal government is not equipped to exercise any such control.

From day to day, we have emphasized the relationship between the wages paid by an employer and the employer's earnings. In the case of public utilities, the power to regulate rates rests with the state. In construing the federal law, the presumption should be indulged that *Congress did not intend to interfere with the states' control in so vital a matter*. The anti-strike law is not directly related to interstate commerce. It is directed primarily to safeguarding the interests of the people of the state and insuring to them adequate service, which, in this field, means uninterrupted service. Uninterrupted service will promote the flow of interstate commerce.

The people of the state possess the ultimate property in and to all lands within its jurisdiction.

Section 3 of Article IX of the State Constitution, which was approved when the state was admitted to the union, reads as follows:

> *"Ultimate property in lands; escheats.* Section 3. The people of the state, *in their right of sovereignty, are declared to possess the ultimate property, in and to all lands within the jurisdiction of the state;* and all lands the title to which shall fail from a defect of heirs shall revert or escheat to the people." (Italics ours)

This is the temple bar, which is dropped when the national government attempts to enter the state. The sovereign nation may enter only if the bar be lifted by the sovereign state.

We have already called attention to the franchise area served by the Gas Company. The state has undertaken to see that gas service is rendered throughout this franchise area of five hundred square miles to a population of nearly eight hundred thousand, and to over two hundred thousand actual customers. If the federal law is to be construed as interfering with the state's control over the wages paid by that utility, then the state is deprived of all effective control over the utility, and no comparable control is pretended to be vested in the national government. The state is still a sovereign entity. Any attempt by the national government to enter this field would be usurpation. However, under a proper interpretation of the federal act, that would not follow. The state is still sovereign in the field covered by the Public Utility Anti-Strike Law.

If we assume that Congress has the power, we submit that, on a proper construction of the Taft-Hartley Act, it has not attempted to preempt this field.

New Jersey Bell Tel. Co. vs. Communications Workers, etc., ... N.J. ....., 75 Atl. 2d 721, decided October 2, 1950.

Wisconsin Employment Relations Board vs. Milwaukee Gas Light Company et al, 258 Wis. 1, 44 N.W. (2d) 547, advance sheets.

The Wisconsin Law is not in conflict with the Taft-Hartley Law. In its scope and purpose, Subchapter III goes beyond the scope and purpose of the Taft-Hartley Law. The fact must be borne in mind in order to make clear the exact principles which must be applied in determining whether the act conflicts with the Taft-Hartley Law, specifically in order to make it clear that it is the principle of cases such as *Allen Bradley Local vs. Wisconsin E. R. Bd.*, 315 U. S. 740, 86 L.Ed. 1154 (1942) and *Hill vs. Florida*, 325 U. S. 538, 89 L.Ed. 1779 (1945) which is applicable here, rather than the principle laid down in *Bethlehem Steel Co. vs. New York State Labor Relations Board*, 330 U. S. 767, 91 L.Ed. 1234 (1947).

The latter case held that the New York Labor Board might not certify a foreman's union as a bargaining unit where the refusal of the National Labor Relations Board to certify foremen's unions demonstrated a federal policy against such certifications. The case is concerned with concurrent jurisdiction of state and federal labor boards over matters which either is empowered to entertain and decide. Certain dictum in the decision has caused confusion and considerable diversity of interpretation; compare, e. g., *LaCrosse Tel. Co. vs. W. E. R. B.*, 251 Wis. 583 (1947) with *Pittsburgh Rys. Co. Substation Operators and Maintenance Employees' case*, 357 Pa. 379, 54 Atl. (2d) 891 (1947). Perhaps the diversity has been dispelled by the recent decision of this Court in *LaCrosse Telephone Corp. vs. Wisconsin E. R. Board*, 336 U.S. 18,

93 L.Ed. 463 (1949), but that decision would not preclude action where, as here, the Taft-Hartley Law does not purport to regulate the aspects of the employer-employee relations regulated by Subchapter III.[1]

In the *Bethlehem Steel Co.* case, Mr. Justice Jackson stated:

[330 U. S. 767, 773],

> "In the National Labor Relations Act, Congress has sought to reach some aspects of the employer-employee relation out of which such interferences arise. It has dealt with the subject of relationship but partially, and has left outside of the scope of its delegation other closely related matters. Where it leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do we can only assume it to be equally indifferent to what he may do under the compulsion of the state. Such was the situation in *Allen-Bradley Local vs. Board,* 315 U. S. 740, where we held that employee and union conduct over which no direct or delegated federal power was exerted by the National Labor Relations Act is left open to regulation by the state. * * * "

In the very next sentence he continued:

> " * * * However, the power of the state may not so deal with matters left to its control as to stand 'as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.' *Hill vs. Florida,* 325 U. S. 538, 542. * * * "

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[1] We do not ignore the fact that secs. 201-204 of the Taft-Hartley Law, 29 U. S. C. A. secs. 171-174, provide for federal conciliation services, but consider that such provision represents no attempts at regulation by Congress and so is of no concern here. In addition, the provisions of the Taft-Hartley Law contemplate, by their terms, corresponding state services, and in fact, the federal service is directed to avoid atempting to mediate disputes which would have only a minor effect on interstate commerce if state conciliation services are available. Sec. 203(b), 29 U. S. C. A. §173(b).

That latter quotation indirectly states the question which must be dealt with by this court.

A.

The Prohibition of Strikes in this Subchapter Is Not in Conflict With the Taft-Hartley Law.

In *Allen-Bradley Local vs. Wisconsin Employment Relations Board,* 315 U. S. 740, 86 L.Ed. 1154 (1942), the Supreme Court of the United States affirmed a decision of the Wisconsin Supreme Court, sustaining an order of the Wisconsin Employment Relations Board against Local 1111 of the United Electrical Workers, directing the local to stop mass picketing at the Allen-Bradley plant, the Local being admittedly under the general jurisdiction of the National Relations Board by virtue of the National Labor Relations Act. Mr. Justice Douglas at pages 747 through 749 discussed at some length the area in which the State might take action under its police power. At page 750 he stated.

[315 U. S. 740, 750]

"* * * the federal Act does not govern employee or union activity of the type here enjoined. * * *"

Similarly, the Taft-Hartley Law does not purport to govern exclusively employee or union activity of the type prohibited by Subchapter III. It is true that the Act prohibits certain strikes; notably, strikes by a non-certified union and strikes affecting all or a substantial part of an industry engaged in interstate commerce. 29 U. S. C. A. §§176-180; but, there is no implication to be found in the Act suggesting that there is an implied congressional approval of all other strikes. The implication is, in fact, quite to the contrary. Section 13 of the Taft-Hartley Law, 29 U. S. C. A. §163, states:

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike *or to affect the limitations or qualifications on that right.*" (Emphasis supplied)

We are not to be left to conjecture as to the interpretation to be given to that section of the Taft-Hartley Law. The recent case of *International Union vs. Wisconsin E. R. Board,* 336 U. S. 245, 93 L.Ed. 651, 23 L. R. R. M. 2361 (1949) (the Briggs-Stratton case) held that the Wisconsin Employment Relations Board could order the union to cease and desist from instigating intermittent and unannounced work stoppages. In the course of the opinion, Mr. Justice Jackson, speaking for a majority of the court, said:

[336 U. S. 245, 258-9]

" * * * Unless we read into §13 words which Congress showed no intention of including, *all that this provision does is to declare a rule of interpretition for the Act itself which would prevent any use of what originally was a novel piece of legislation to qualify or impede whatever right to strike exists under other laws. It did not purport to modify the body of law as to the legality of strikes as it then existed. This Court less than a decade earlier had stated that law to be that the state constitutionally could prohibit strikes and make a violation criminal.* It had unanimously adopted the language of Mr. Justice Brandeis that 'Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike.' Dorchy vs. Kansas, 272 U. S. 306, 311, 71 L.Ed. 248, 269, 47 S. Ct. 86. *Dissenting views most favorable to labor in other cases had conceded the right of the state legislature to mark the limits of tolerable industrial conflict in the public interest.* Duplex Printing Press Co. vs. Deering, 254, U. S. 443, 488, 65 L.Ed. 349, 365, 41 S. Ct. 172, 16 A. L. R. 196. This court

has adhered to that view. Thornhill vs. Alabama, 310 U. S. 88, 103, 84 L.Ed. 1093, 1102, 60 S. Ct. 736. The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining * * * " (Emphasis supplied)

The appellants have argued that the act is in conflict with Section 7 of the Taft-Hartley Law, 29 U.S.C.A. §157, which gives employees the right to engage in concerted activities. The argument is that a strike for lawful purposes and conducted by lawful means is a concerted activity within the meaning of that section.

In the lower court, the appellants cited Mr. Justice Jackson's opinion in the Briggs-Stratton case setting out the purpose of Section 7. Examination of that quotation does not lead to the interpretation that the appellants would give to it because the appellants ignore the significance of the word "merely." In speaking of the purpose of Section 7, Justice Jackson stated:

[336 U. S. 245, 258]

" * * * No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy *merely* because they are undertaken by many persons acting in concert. * * * "

It is clear that Subchapter III does not purport to reapply the long defunct theory of conspiracy to concerted activities of public utility employees. Subchapter III merely recognizes that when a group of utility employees strike great hardship and danger is threatened to the public.

In *Allen Bradley Local vs. Wisconsin E. R. Board,* 315 U. S. 740, 86 L.Ed. 1154 (1942), the Supreme Court said:

[315 U. S. 740, 749, 750]

" * * * the intention of Congress to exclude the States from exercising their police power must be clearly manifested."

This statement was quoted with approval in the Briggs-Stratton case. 336 U. S. 245 ,253. If the declaration of Subchapter III that certain strikes are illegal is an otherwise valid exercise of the state's police power, there is no conflict with the "concerted activities" clause. As was said in *N. L. R. B. vs. Peter C. K. Swiss Chocolate Co.,* 130 F. (2d) 503, 506 (C. C. A. 2d 1942), that clause "does not excuse 'concerted activities' themselves independently unlawful." And in *International Union vs. Wisconsin E. R. Board,* 250 Wis. (1947), Justice Fowler said, in referring to Section 7:

[250 Wis. 550, 568]

" * * * That section does not authorize employees to use concerted activities which are in violation of law. The activities which they are authorized to use in concert are those which are lawful. * * * The same is in effect held in Allen-Bradley Local vs. Wisconsin E. R. Board, 315 U. S. 740. * * * "

If Congress has recognized the right to strike, this Court has made it clear that the right is not absolute even if the methods or tactics can not be condemned. The strike may be condemned because of its results. That is clear from the following reference in the *Briggs & Stratton* case to the language of the *Fansteel* case.

[336 U. S. 245, 259-260]

"As to the right to strike, however, this Court, quoting the language of §13, has said, 306 U. S. 240, 256, 83 L.Ed. 627, 635, 59 S. Ct. 490, 123 A. L. R. 599, 'But this recognition of "the right to strike" plainly contemplates a lawful strike,—the exercise of the unquestioned right to quit work,' and it did not

operate to legalize the sit-down strike, which state law made illegal and state authorities punished. National Labor Relations Bd. vs. Fansteel Metallurgical Corp., 306 U. S. 240, 83 L.Ed. 627, 59 S. Ct. 490, 123 A. L. R. 599. *Nor, for example, did it make legal a strike that ran afoul of federal law,* Southern S. S. Co. vs. National Labor Relations Bd., 316 U. S. 31, 86 L.Ed. 1246, 62 S. Ct. 886; *nor one in violation of a contract made pursuant thereto,* National Labor Relations Bd. vs. Sands Mfg. Co., 306 U. S. 332, 83 L. Ed. 682, 59 S. Ct. 508; *nor one creating a national emergency,* United States vs. United Mine Workers, 330 U. S. 258, 91 L.Ed. 884, 67 S. Ct. 677." (Emphasis supplied)

B.

The Provisions for Compulsory Arbitration in this Act Are Not in Conflict With the Taft-Hartley Law.

Section 7 of the Taft-Hartley Law, 29 U. S. C. A. §157, grants to employees the right to bargain collectively. Examination of the conciliation and compulsory arbitration provisions of Subchapter III demonstrates that this right is in no way restricted by those provisions. Section 111.56, Wis. Stats., states:

> "During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other."

And Section 111.59, Wis. Stats., referring to the arbitration order, states:

> " * * * but such order may be changed by mutual consent or agreement of the parties * * * "

Thus, Subchapter III contemplates that the employer and the representative of the employees are free to meet at any time, both during and after conciliation or arbitration proceedings, to settle their differences by collective bargaining. The entire procedure of Subchapter III is subject to and inferior to collective bargaining. It is not contended, indeed the provisions of Subchapter III forbid, that the pendency of conciliation or arbitration proceedings should be interpreted as furnishing a defense to the employer or the employees in an unfair labor practice proceeding brought before the National Labor Relations Board under Section 8(a)(5), 29 U.S.C.A. §158(a)(5), for refusal to bargain collectively.

Nor can it be successfully argued that the Taft-Hartley Law contemplates that employees shall never work except under terms agreed upon by collective bargaining. Section 8(d), 29 U. S. C. A. §158(d) states:

> "For the purposes of this section, to bargain collectively is the performance of a mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.* * * *" (Emphasis supplied)

Experience has shown that collective bargaining does not always prove successful. The italicized portion of the above quotation states clearly that there need never be agreement. All that the Taft-Hartley Law purports to

do is to insure that the parties get together and attempt in good faith to iron out their differences. It is silent as to the procedure to be followed when the parties have reached an impasse. It is at this point that strikes are likely to occur, that "primitive methods of trial by combat" are employed. The result may be that the employer accepts the union's terms or the union accepts the employer's terms, or a compromise is reached which favors the stronger combatant. In any event, collective bargaining has not been the means of arriving at the final terms. Nor does the Taft-Hartley Law contemplate that it need be.

The conciliation and compulsory arbitration proceedings of Subchapter III can come into operation only where the collective bargaining machinery has broken down and an impasse has been reached. Where the boundaries of the field of regulation of the Haft-Hartley Law have been reached, the state has felt it necessary in the public interest that the hitherto peaceful disputants should not enter into a no-man's land of unrestricted industrial warfare, to be carried on at the expense of the public health and safety. It compels the parties to arrive at temporary terms by "processes of justice," at the same time leaving the way open for peaceful discussions. Indeed, such a procedure would seem to be more conducive to a resumption of collective bargaining processes than the alternative unrestricted warfare with its consequent strengthening of antagonism and ill will.

C.

The Appellants' Argument as to Conflict With the Taft-Hartley Law Ignores the Peculiar Position of the Public Utility.

The argument seems to be that depriving employees of the ability to strike and substituting compulsory arbitration has such an effect on the processes of collective bargaining as to stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Hill vs. Florida, 325 U. S. 538, 542, 89 L.Ed. 1779 (1945).

The appellants state, and we do not deny, that the purpose of the Wagner Act carried over into the Taft-Hartley Law was to enable employees to join together so that they would be on an equal footing with the employer with equal economic power. While the Wagner Act may have eventually worked to give the employees a stronger position than the employer, still the avowed purpose of the Taft-Hartley Law was to bring the relative powers into equilibrium.

Some of the rights guaranteed by Section 7 may be capable of exact definition. See e. g. *Hill vs. Florida,* supra. The words "bargain collectively," however, are not words of art, but are merely an expression of an idea which must be interpreted in the light of the purposes and objectives which Congress contemplated. The declared purpose of Congress was to promote the flow of commerce by "restoring equality of bargaining power between employers and employees." 29 U. S. C. A. §151.

In applying this purposes' and objectives' test to Subchapter III the appellants ignore, as they have ignored elsewhere, the peculiarity of the public utility. It may well be that as applied to the usual situation of a private employer, substituting compulsory arbitration for strikes would work a hindrance to the accomplishment of Congressional objectives. But not so in the case of the public utilities. *In the case of public utilities the substitution of compulsory arbitration for strikes, besides being a salutory measure for the protection of the health, welfare and life of the public, operates to promote the balance of power which the Taft-Hartley Law was designed to create.*

We need not repeat the citation of authorities to the effect that the public utility must furnish continuous service. The public utility may not lock out its employees. As we have previously stated, *the public utility may not strike.* The balance of power which Congress tried to create does not exist if the employees are able to strike, but the employer is not able to strike. All of the economic power rests with the employees. As a matter of fact, prior to the passage of Subchapter III, the union was in the position of a bargainer with the power of eminent domain.

But subchapter III balances that otherwise unbalanced position. Both sides come to the collective bargaining table with the equal right in the background to resort to arbitration if the demands of the other are out of line. Thus Subchapter III fosters the purposes and objectives of Congress in enacting the Taft-Hartley Law.

D.

Subchapter III Is an Exercise of the Sovereign Power of the State, and, as Such, Should Not Be Held Invalid Unless Clearly in Conflict With the Taft-Hartley Law.

We have referred to the language in the *Allen-Bradley* case to the effect that the intention of Congress to exclude the exercise of the State's police power must be clearly manifested. We would contend for a further rule of construction here.

It is clear that Congress did not intend the Taft-Hartley Law to be applicable to activities of the State. Section 2(2), 29 U. S. C. A. §152(2), excludes from the definition of "employer" " * * * any State or political subdivision thereof." It is apparent that if the State or the City of Milwaukee were the owner of the respondent Milwaukee Gas Light Company no question of conflict with the federal law would arise. Admittedly the respondent cannot here claim to come under the specific immunity of Section 2(2), but Section 2(2) is demonstrative of the fact that the Taft-Hartley Law was not intended by Congress to interfere with the exercise by the states of their sovereign powers.

The State of Wisconsin exercises extensive control of the respondent through its agency, the Public Service Commission. The public utility exercises a public function. It is not a private corporation except in a technically legal sense.

See

Shepard vs. The Milwaukee Gas Light Co., 6 Wis. 526, 534 (1858).

The State of Wisconsin directs the price it shall pay for the products it purchases and the rates it shall charge for its service. It is an arm of the State. Its employees are, in a sense, public employees.

In enacting Subchapter III, the State has done more than exercise its police power. It has exercised its sovereign power. Even if we can not rely on the exact words of the Taft-Hartley Law, we can at least rely on its expressed intention to keep hands off of the exercise of the sovereign powers of the states.

We do not have here the question of whether the Act of Congress should apply to state owned enterprises, a question which was before the United States Supreme Court in *United States vs. California,* 297 U. S. 175, 80 L.Ed. 567 (1936). Here Congress has specifically exempted the states. We contend not only that such a specific exemption shows an intention of Congress not to interfere with the sovereign functions of the state, but also that the Taft-Hartley Law should not be interpreted so to interfere, even in the absence of such a Congressional expression of intention. See the quotation from *Butler vs. Perry* which we have set out on page 42, supra. Where, as here, there is a quasi-pubic corporation, a virtual arm of the State, organized for the furnishing of essential services to the citizens of the State, a function which the State or its political subdivisions could perform directly, and where Congress has shown an intention to exclude the states or their political subdivisions, any exercise of the sovereign powers of the State should not be found invalid unless the conflict with federal law is clear and unmistakable.

VI.

THE JUDGMENT IS NOT APPEALABLE TO THIS COURT UNDER SECTION 1253 IN VIEW OF THE FACT THAT, AS WE SUBMIT, IT NEITHER GRANTS NOR DENIES EITHER AN INTERLOCUTORY OR A PERMANENT INJUNCTION

The amended complaint describes this as "a suit of a civil nature seeking an injunction and a declaratory judgment * * *" (R. 1, par. 1).

The injunction prayed for is a "permanent injunction enjoining and restraining the defendants and their agents from taking steps to enforce the penalties of Subchapter 3, Chapter 111, Wisconsin Statutes, 1947, or other provisions thereof * * *" (R. 12, par. (d))

The declaratory relief prayed for is that:

> "(e) This court issue a judgment declaring that the provisions of sub-chapter 3, Chapter 111 of the Wisconsin Statutes of 1947," in certain respects, "are void, illegal, unenforceable and repugnant to the United States Labor-Management Relations Act of 1947, and to the Constitution of the United States." (R. 12, par. (e))

In other words, the plaintiffs sought to have the Public Utility Anti-Strike Law declared invalid and its enforcement enjoined.

The Wisconsin Employment Relations Board is charged with the enforcement of that act. On October 3, 1949, the Board issued an order directing the Company and the Union to join in striking names from a given list of persons to act as arbitrators (R. 39, par. 26; R. 15, Ex. B).

On October 4, 1949, the plaintiffs (appellants) filed their complaint in this action.

On October 5, 1949, the Union went out on strike (R. 42, par. 30).

On the same day, the Board commenced an action in the Circuit Court for Milwaukee County, Wisconsin, against the Company and certain of its officers, and against the Union and certain of its members, to enjoin the strike, and procured an order to show cause why a temporary injunction should not issue.

Negotiations were reopened, and, On October 6, 1949, the Union and the Company agreed on wages, hours and other conditions of employment, but did not come to an agreement on a pension plan which was under discussion (R. 43, 44, pars. 33, 34). The strike was called off and the employees returned to work (Appellants' Brief p. 5).

The case was tried in the District Court on November 28, 1949 (R. 84). The record does not show that any impasse or stalemate arose in respect to the pension plan at any time thereafter (R. 43, 44, pars. 33, 34). The plaintiffs offered no proof of any impasse or stalemate, although they had the right so to do (R. 34, Stipulation par. III).

The decision, announced on April 28, 1950, directed that the findings be submitted to their counsel before signature (R. 66). They made no request to have an injunction embodied in the judgment.

Hence it follows that, when the case went to judgment, the plaintiffs were no longer asking for an injunction. All that they were asking for was a declaratory judgment holding the anti-strike law invalid.

We submit that the plaintiffs are in no position to claim that the judgment in fact operates to grant or deny either an interlocutory or a permanent injunction within the meaning of Section 1253 and is not appealable.

That section reads as follows:

> "§1253. Direct appeals from decisions of three-judge courts.
>
> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926."

It is respectfully submitted that this was not a judgment granting or denying an injunction, and is not appealable to this court under Section 1253; and that the appeal should, therefore, be dismissed.

VII.

THE CONTROVERSY HAS BEEN SETTLED AND THE ISSUES RAISED ARE NOW MOOT

We are very much in the same position as a party to a money judgment which has been paid voluntarily and satisfied after an appeal. It would be his duty to advise the court of that development. We think it our duty to advise the court of an analogous situation presented in the action at bar.

Because of that, we now suggest these facts, proof of which we respectfully ask leave to submit.

A contract disposing of all the matters in dispute, except for a certain pension plan, was entered into on October 6,

1949, which contract remained in force until June 1, 1950. At that time that contract was reopened for negotiations, which continued without stalemate or impasse until September 11, 1950, when a new contract was entered into, which by its terms shall remain in force until June 1, 1951, and from year to year thereafter unless notice of a desire to modify be given on or before April 1st of any year.

On August 14, 1950, a contract was entered into between the parties embodying a pension plan, which, by its terms, is to remain in effect until midnight of December 31, 1952. Under its terms, either party may request renegotiation of the provisions of the plan on and after December 31, 1952.

That contract contained the following provision:

> "(b) During the period of three (3) years from January 1, 1950, neither the Company nor the Union shall demand any change, modification or amendment in this pension agreement, nor shall either party be required to bargain with respect to pensions in any form whatsoever; nor shall a change, modification or amendment to this agreement be an objective of or be stated as reason for any strike or lock-out or other exercise of economic force or threat thereof by the Union or the Company; nor will the Union sanction or condone any strike or other exercise of economic force or threat thereof for the purpose of securing any change, modification or amendment to this pension agreement."

If permitted to file such proof, we will ask for a dismissal of the appeal.

CONCLUSION

We respectfully submit:

1. That if the appeal be not dismissed, the judgment should be affirmed on the grounds stated in the majority opinion in the District Court.

2. That if the appeal be not dismissed or the judgment affirmed on the foregoing ground, the judgment should be affirmed on the pleadings and the undisputed evidence for the reason that the Wisconsin Public Utility Anti-Strike Law is valid.

3. That the appeal should be dismissed for the reasons that the judgment is not appealable, and that there is no longer any controversy between the parties.

Respectfully submitted,

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APPENDIX A

THE WISCONSIN LAW INVOLVED

CHAPTER 111
EMPLOYMENT RELATIONS

* * *

SUBCHAPTER I.
EMPLOYMENT PEACE ACT

111.01 Declaration of policy. The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this chapter is enacted, is declared to be as follows:

(1) It recognizes that there are three major interests involved, namely: That of the public, the employe, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration.

It is also recognized that whatever may be the rights of disputants with respect to each other in any controver-

sy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion.

(3) Negotiation of terms and conditions of work should result from voluntary agreement between employer and employe. For the purpose of such negotiation an employe has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.

(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.

While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat.

* * * *

111.03 Employment relations board. [The board is created under this section.]

* * *

SUBCHAPTER II.

FAIR EMPLOYMENT

* * *

SUBCHAPTER III.
PUBLIC UTILITIES

* * *

111.50 Declaration of Policy. It is hereby declared to be the public policy of this state that it is necessary and essential in the public interest to facilitate the prompt, peaceful and just settlement of labor disputes between public utility employers and their employes which cause or threaten to cause an interruption in the supply of an essential public utility service to the citizens of this state and to that end to encourage the making and maintaining of agreements concerning wages, hours and other conditions of employment through collective bargaining between public utility employers and their employes, and to provide settlement procedures for labor disputes between public utility employers and their employes in cases where the collective bargaining process has reached an impasse and stalemate and as a result thereof the parties are unable to effect such settlement and which labor disputes, if not settled, are likely to cause interruption of the supply of an essential public utility service. The interruption of public utility service results in damage and injury to the public wholly apart from the effect upon the parties immediately concerned and creates an emergency justifying action which adequately protects the general welfare.

111.51 Definitions. When used in this subchapter:

(1) "Public utility employer" means any employer (other than the state or any political subdivision thereof) engaged in the business of furnishing water, light, heat, gas, electric power, public passenger transportation or communication, or any one or more of them, to the public in this state. This subchapter does not apply to railroads nor railroad employes.

(2) "Essential service" means furnishing water, light, heat, gas electric power, public passenger transportation or communication, or any one or more of them, to the public in this state.

(3) "Collective bargaining" means collective bargaining of or similar to the kind provided for by subchapter I of this chapter.

(4) "Board" means the Wisconsin employment relations board.

(5) "Arbitrators" refers to the arbitrators provided for in this subchapter.

111.52 Settlement of Labor Disputes Through Collective Bargaining and Arbitration. It shall be the duty of public utility employers and their employes in public utility operations to exert every reasonable effort to settle labor disputes by the making of agreements through collective bargaining between the parties, and by maintaining the agreements when made, and to prevent, if possible, the collective bargaining process from reaching a state of impasse and stalemate.

111.53 Appointment of Conciliators and Arbitrators. Within 30 days after this subchapter becomes effective, the board shall appoint a panel of persons to serve as conciliators or arbitrators under the provisions of this subchapter. No person shall serve as a conciliator and arbitrator in the same dispute. Each person appointed to said panels shall be a resident of this state, possessing in the judgment of the board, the requisite experience and judgment to qualify such person capably and fairly to deal with labor dispute problems. All such appointments shall be made without a consideration of the political affiliations of the appointee. Each appointee shall take an oath to perform honestly and to the best of his ability the duties

of conciliator or arbitrator, as the case may be. Any appointee may be removed by the board at any time or may resign his position at any time by notice in writing to the board. Any vacancy in the panels shall be filled by the board within 30 days after such vacancy occurs. Such conciliators and arbitrators shall be paid reasonable compensation for services and for necessary expenses, in an amount to be fixed by the board, such compensation and expenses to be paid out of the appropriation made to the board by section 20.585 upon such authorizations as the board may prescribe.

111.54 Conciliation. If in any case of a labor dispute between a public utility employer and its employes, the collective bargaining process reaches an impasse and stalemate, with the result that the employer and the employes are unable to effect a settlement thereof, then either party to the dispute may petition the board to appoint a conciliator from the panel, provided for by section 111.53. Upon the filing of such petition, the board shall consider the same, and if in its opinion, the collective bargaining process, notwithstanding good faith efforts on the part of both sides to such dispute, has reached an impasse and stalemate and such dispute, if not settled, will cause or is likely to cause the interruption of an essential service, the board shall appoint a conciliator from the panel to attempt to effect the settlement of such dispute. The conciliator so named shall expeditiously meet with the disputing parties and shall exert every reasonable effort to effect a prompt settlement of the dispute.

111.55 Conciliator Unable to Effect Settlement; Appointment of Arbitrators. If the conciliator so named is unable to effect a settlement, of such dispute within a 15-day period after his appointment, he shall report such fact to the board; and the board, if it believes that a continu-

ation of the dispute will cause or is likely to cause the interruption of an essential service, shall submit to the parties the names of either 3 or 5 persons from the panel provided for in section 111.53. Each party shall alternately strike one name from such list of persons. The person or persons left on the list shall be appointed by the board as the arbitrator (or arbitrators) to hear and determine such dispute.

111.56 Status Quo to be Maintained. During the pendency of proceedings under this subchapter existing wages, hours, and conditions of employment shall not be changed by action of either party without the consent of the other.

111.57 Arbitrator to Hold Hearings. (1) The arbitrator shall promptly hold hearings and shall have the power to administer oaths and compel the attendance of witnesses and the furnishing by the parties of such information as may be necessary to a determination of the issue or issues in disputes. Both parties to the dispute shall have the opportunity to be present at the hearing, both personally and by counsel, and to present such oral and documentary evidence as the arbitrator shall deem relevant to the issue or issues in controversy.

(2) It shall be the duty of the arbitrator to make written findings of fact, and to promulgate a written decision and order, upon the issue or issues presented in each case. In making such findings the arbitrator shall consider only the evidence in the record. When a valid contract is in effect defining the rights, duties and liabilities of the parties with respect to any matter in dispute, the arbitrators shall have power only to determine the proper interpretation and application of contract provisions which are involved.

(3) Where there is no contract between the parties, or where there is a contract but the parties have begun negotiations looking to a new contract or amendment of the existing contract, and wage rates or other conditions of employment under the proposed new or amended contract are in dispute, the factors, among others, to be given weight by the arbitrator in arriving at decision, shall include:

(a) Comparison of wage rates or other conditions of employment of the utility in question with prevailing wage rates or other conditions of employment in the local operating area involved;

(b) Comparison of wage rates or other working conditions with wage rates or other working conditions maintained for the same or similar work of workers exhibiting like or similar skills under the same or similar working conditions in the local operating area involved;

(c) The value of the service to the consumer in the local operating area involved;

(d) Where a public utility employer has more than one plant or office and some or all of such plurality of plants or offices are found by the arbitrator to be located in separate areas with different characteristics, consideration shall be given to the establishment of separate wage rates or schedule of wage rates and separate conditions of employment for plants and offices in different areas;

(e) The overall compensation presently received by the employes having regard not only to wages for time actually worked but also to wages for time not worked, including (without limiting the generality of the foregoing) vacation, holidays, and other excused time, and all benefits received, including insurance and pensions, medical and hospitalization benefits and the continuity and stabili-

ty of employment enjoyed by the employes. The foregoing enumeration of factors shall not be construed as precluding the arbitrator from taking into consideration other factors not confined to the local labor market area which are normally or traditionally taken into consideration in the determination of wages, hours and working conditions through voluntary collective bargaining or arbitration between the parties.

111.58 Standards for Arbitration. The arbitrator shall not make any award which would infringe upon the right of the employer to manage his business or which would interfere with the internal affairs of the union.

111.59 Filing of Order With Clerk of Circuit Court; Period Effective; Retroactivity. The arbitrator shall hand down his findings, decision and order (hereinafter referred to as the order) within 30 days after his appointment; except that the parties may agree to extend, or the board may for good cause extend the period for not to exceed an additional 30 days. If the arbitrators do not agree, then the decision of the majority shall constitute the order in the case. The arbitrator shall furnish to each of the parties and to the public service commission a copy of the order. A certified copy thereof shall be filed in the office of the clerk of the circuit court of the county wherein the dispute arose or where the majority of the employes involved in the dispute reside. Unless such order is reversed upon a petition for review filed pursuant to the provisions of section 111.60, such order, together with such agreements as the parties may themselves have reached, shall become binding upon, and shall control the relationship between the parties from the date such order is filed with the clerk of the circuit court, as aforesaid, and shall continue effective for one year from that date, but such order may be changed by mutual consent or agreement of the

parties. No order of the arbitrators relating to wages or rates of pay shall be retroactive to a date before the date of the termination of any contract which may have existed between the parties, or, if there was no such contract, to a date before the day on which the demands involved in the dispute were presented to the other party. The question whether or not new contract provisions or amendments to an existing contract are retroactive to the terminating date of a present contract, amendments or part thereof, shall be matter for collective bargaining or decision by the arbitrator.

111.60 Judicial Review or Order of Arbitrator. Either party to the dispute may within 15 days from the date such order is filed with the clerk of the court, petition the court for a review of such order on the ground (1) that the parties were not given reasonable opportunity to be heard, or (2) that the arbitrator exceeded his powers, or (3) that the order is not supported by the evidence, or (4) that the order was procured by fraud, collusion, or other unlawful means. A summons to the other party to the dispute shall be issued as provided by law in other civil cases; and either party shall have the same rights to a change of venue from the county, or to a change of judge, as provided by law in other civil cases. The judge of the circuit court shall review the order solely upon the grounds for review herein above set forth and shall affirm, reverse, modify or remand such order to the arbitrator as to any issue or issues for such further action as the circumstances require.

111.61 Board to Establish Rules. The board shall establish appropriate rules and regulations to govern the conduct of conciliation and arbitration proceedings under this subchapter.

111.62 Strikes, Work Stoppages, Slowdowns, Lockouts, Unlawful; Penalty. It shall be unlawful for any group of employes of a public utility employer acting in concert to call a strike or to go out on strike, or to cause any work stoppage or slowdown which would cause an interruption of an essential service; it also shall be unlawful for any public utility employer to lock out his employes when such action would cause an interruption of essential service; and it shall be unlawful for any person or persons to institgate, to induce, to conspire with, or to encourage any other person or persons to engage in any strike or lockout or slowdown or work stoppage which would cause an interruption of an essential service. Any violation of this section by any member of a group of employes acting in concert or by any employer or by any officer of an employer acting for such employer, or by any other individual, shall constitute a misdemeanor.

111.63 Enforcement. The board shall have the responsibility for enforcement of compliance with the provisions of this subchapter and to that end may file an action in the circuit court of the county in which any such violation occurs to restrain and enjoin such violation and to compel the performance of the duties imposed by this subchapter. In any such action the provisions of sections 103.51 to 103.63 shall not apply.

111.64 Construction. (a) Nothing in this subchapter shall be construed to require any individual employe to render labor or service without his consent, or to make illegal the quitting of his labor or service or the withdrawal from his place of employment unless done in concert or agreement with others. No court shall have power to issue any process to compel an individual employe to render labor or service or to remain at his place of employment without his consent. It is the intent of this sub-

chapter only to forbid employes of a public utility employer to engage in a strike or to engage in a work slowdown or stoppage in concert, and to forbid a public utility employer to lock out his employes, where such acts would cause an interruption of essential service.

(b) All laws and parts of laws in conflict herewith are to the extent of such conflict concerning the subject matter dealt with in this subchapter, supplanted by the provisions of this subchapter.

111.65 Separability. It is hereby declared to be the legislative intent that if any provision of this subchapter, or the application thereof to any person or circumstance is held invalid, the remainder of the subchapter and the application of such provisions to persons or circumstances other than those as to which it is held invalid shall not be affected thereby.

* * *

APPENDIX B

WISCONSIN DECLARATORY JUDGMENTS ACT

The declaratory judgments act, so far as material, reads as follows:

"269.56 **Declaratory Judgments Act.** (1) Scope. Courts of record within their respective jurisdiction shall have *power to declare rights, status and other legal relations whether or not further relief is or could be claimed.* No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

"(2) Power to construe, etc. *Any person* interested under a deed, will, written contract or other writ-

ings constituting a contract, or *whose rights, status or other legal relations are affected by a statute,* municipal ordinance, contract or franchise, *may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.*

* * *

"(5) Enumeration not exclusive. The enumeration in subsections (2), (3) and (4) does not limit or restrict the exercise of the general powers conferred in subsection (1) in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

* * *

"(11) Parties. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the right of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a *party,* and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be *served with a copy of the proceeding and be entitled to be heard.*

* * *

"(16) Short Title. This section may be cited as the 'Uniform Declaratory Judgments Act.'" [Italics ours]

APPENDIX C

Resume of Compulsory Arbitration and Related Laws of Various States in the Public Utility Field.

1. *Florida:*

Chapter 23911 of Laws of 1947 provides for conciliation and compulsory arbitration. Lockout and strikes are cause for damages, and violations may be enjoined.

2. *Indiana:*

Chapter 341 of Acts of 1947 is substantially similar to Florida law.

3. *Kansas:*

General Statutes Annotated, 1935, Section 44-606, provides that it shall be unlawful, willfully to hinder, delay, limit, or suspend continuous and efficient operation of a public utility for the purpose of evading the law. The State Labor Commissioner is empowered to investigate and settle any controversy which interferes with orderly operation of public utilities and may take over and operate public utility in which suspension of operations affects the public welfare.

4. *Massachusetts:*

Chapter 596 of Acts of 1947 provides for voluntary arbitration. If dispute unsettled, governor may declare emergency and make arrangements for continued service. Governor may seize plant, and strikes in a plant so seized are unlawful, and the governor may institute injunctive relief. During declared period of emergency, whether plant seized or not, wages and hours are to remain static unless emer-

gency board of arbitrators appointed by governor recommends changes, in which event governor may impose changes.

5. *Michigan:*

Section 13 of Act No. 318 of 1947. If parties fail to submit dispute to voluntary arbitration, an arbitration board is appointed. Terms and conditions of employment are set by order of board and are binding on parties. Strikes are forbidden during arbitration proceedings and during effective period of board's order. Injunctive relief is afforded to anyone injured by violations of the act.

6. *Missouri:*

H. B. 180, Laws of 1947, establishes State Board of Mediation. Compulsory arbitration may be ordered when voluntary arbitration fails. If stoppage of service threatened, governor may seize plant. Strikes during seizure are prohibited. Injunctive relief is afforded.

7. *Nebraska:*

R. S. Supp. 1947, 48-802 through 48-823. Court of Industrial Relations established with jurisdiction over disputes in state-owned and privately-owned utilities. Unsettled disputes must be submitted to court. Strikes and lockouts are prohibited. Orders of court are binding on parties. Failure to obey orders constitutes contempt.

8. *New Jersey:*

Chapter 38, Laws of 1946, allows governor to seize utility if dispute not settled and stoppage or service threatened. Chapter 75, Laws of 1947, provides for compulsory arbitration, and penalties for violation

of arbitration award. Strikes and lockouts during state seizure. State officers may enjoin violations of law. Chapters 47, 75 Laws 1949, Chapter 308 Laws 1950.

9. *Pennsylvania:*

Act No. 485, Laws of 1947, is substantially similar to Subchapter III of Chapter 111.

10. *Texas:*

Chapter 84, Laws of 1947, declares it to be the public policy of Texas that continuous service by public utilities is absolutely essential to life, health, and safety of all the people, and provides it shall be unlawful for any persons to picket the plant, premises, or any part of a public utility, or to intimidate, threaten or harass an employee of a public utility with intent to disrupt service or prevent maintenance thereof; district courts are authorized to enjoin such unlawful acts. Further, it is made duty of governor to exercise all of the powers available under constitution or laws of Texas to protect public from dangers incident to stoppage or interruption in the service of a public utility because of violation of the Act.

11. *Virginia:*

Code of 1950, Section 40-78, provides it shall be unlawful for a public utility or a union to engage in a lockout, strike, or work stoppage before certain conditions are complied with. If parties are unwilling to submit a dispute to voluntary arbitration, governor is empowered to take possession of the utility or the use of, and operation by, the commonwealth. It is unlawful to interfere with governor's efforts to secure services of officers or employees of a utility or any other person in order to continue the operation of the utility on behalf of commonwealth. Picketing

of work engaged in by persons employed by state is declared to be unlawful obstruction of the exercise of an essential function of the government.

12. *Hawaii:*

Revised Laws of Hawaii, 1945, Sections 4161-4174, declare it is the duty of a public utility and its employees and their representatives to use processes of collective bargaining in settlement of all disputes between utility and its employees without resort to lockout or strike. Strikes and lockouts are prohibited, until notices are given and hearings held as specified in Act, where interruption of public utility service is threatened or caused.